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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. [redacted]110

BETTY J. WORRELL, *Petitioner*

v.

GEORGE W. MATTERS, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Respondents

Betty J. Worrell prays that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania in the above-entitled case filed January 17, 1967.

REPORTS OF THE OPINIONS OF THE COURT BELOW

The opinions of the Pennsylvania Supreme Court reported at 424 Pa. 202 and 226 A.2d 53. They are appended to this petition as Appendices A to E.

JURISDICTION

The judgment of the court below is dated and was entered on January 17, 1967.

The jurisdiction of this court is based on Section 1257, Title 28, United States Code, providing for appeal to this court where the constitutionality of a state statute is challenged and upheld by the highest appellate court of the state.

QUESTIONS PRESENTED

1. Does the First Amendment to the Constitution of the United States forbid the Legislature of the Commonwealth of Pennsylvania from requiring the use of public school buses for the transportation of pupils to sectarian religious schools at public expense?

2. Is the statute in question, which requires the public school districts to provide free transportation of pupils who attend nonpublic elementary and high schools not operated for profit, so vague and indefinite as to violate due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: . . .

United States Constitution, Amendment XIV, Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; . . .

Act of the Legislature of the Commonwealth of Pennsylvania, Act No. 91 approved June 15, 1965, Pamphlet Laws, p. 126, 24 Purdon's Statutes Annotated, Section 13-1361 (Pocket Part).

An Act amending the act of March 10, 1949 (P.L. 30), entitled "An act relating to the public school system, including certain provisions applicable as well to private and parochial schools; amending, revising, consolidating and changing the laws relating thereto," further providing for the health, welfare and safety of the children of the Commonwealth by requiring school districts under certain circumstances to provide free transportation of pupils attending nonpublic elementary and high schools not operated for profit.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1.

Section 1361, act of March 10, 1949 (P.L. 30), known as the "Public School Code of 1949," is amended to read:

Section 1361. When provided

The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the public schools and to and from any points in the Commonwealth in order to provide tours for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of resident pupils to and from the public

schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend nonpublic elementary and high schools not operated for profit. Such transportation provided for pupils attending nonpublic elementary and high schools not operated for profit shall be over established public school bus routes. Such pupils shall be transported to and from the point or points on such routes nearest or most convenient to the school which such pupils attend. The board of school directors shall provide such transportation whenever so required by any of the provisions of this act or of any other act of Assembly.

Section 2.

The amendments made by this act shall not be so construed as to limit or reduce in any way the payments now made by the Commonwealth to various school districts to help defray the cost of transporting pupils and the additional costs incurred by the boards of school directors in furnishing transportation under said amendments shall be included in the amounts for which reimbursement may be received from the Commonwealth as now provided by law.

Section 3.

This act shall take effect July 1, 1965.

Approved the 15th day of June A. D. 1965.

STATEMENT OF THE CASE

In 1965 the General Assembly of the Commonwealth of Pennsylvania amended the Public School Code of 1949, Section 1361, to provide for free transportation of elementary and high school students who regularly attend nonpublic, nonprofit schools.

In compliance with the amendment, the Rose Tree Union School District, located in Delaware County, Pennsylvania, approved the expenditure of funds of the school district to provide for bus transportation for nonpublic school pupils, most, if not all, of whom attend a sectarian school.

On August 31, 1965, plaintiff filed an action in the Court of Common Pleas of Delaware County against the school directors asking for an injunction to prevent the directors from expending any further sums of money for the purpose of implementing the Act of the Assembly.

Defendant school directors filed an answer to plaintiff's amended complaint admitting the proposed expenditures and that said expenditures would be used for the transportation of pupils to a sectarian school or schools.

On September 3, 1965, six individuals (three couples) having children in attendance at three separate Roman Catholic schools in Delaware County, filed a petition to intervene as defendants, averring that their rights under the school busing law would be affected by the litigation, and further, that the grant of an injunction against implementation of the law would deprive them of their religious liberty under the First Amendment. The Common Pleas Court gave leave to intervene.

The Attorney General of the Commonwealth of Pennthe Pennsylvania Supreme Court. The petition was granted. sylvania also intervened and filed a petition for certiorari to

Thereafter, counsel in a similar case arising in Philadelphia County filed a petition for leave to intervene and the court granted that petition and a similar petition from the School District of Philadelphia.

This case and a case arising in Montgomery County, Pennsylvania were heard together. In five separate opinions, the court below upheld the constitutionality of the Pennsylvania act by a five to two majority.

The validity of the act under the United States Constitution was raised in paragraph 7 of the Amended Complaint, Appendix F, page 73a hereof. The Supreme Court of Pennsylvania upheld the constitutionality of the busing law beginning at page 2a of its opinion, Appendix A hereof.

ARGUMENT

1. This case involves that portion of the First Amendment to the Constitution regarding the establishment of religion and is of great concern to the citizens of the United States.

Probably no section of American law has produced so much litigation and been the subject of so much legal opinion as the section involved here. This area of the law is clouded with doubt and confusion, and for the good of all concerned a more definitive decision from this court is needed.

The decision of this court (*Everson v. Board of Education*, 330 U.S. 1), which the court below deemed controlling, was decided twenty years ago by a court divided 5 to 4. Since that decision this court has considered a number of other cases involving the establishment clause of the First Amendment which have cast some question on its validity. As a matter of fact, Justice Douglas, who joined in the majority opinion in *Everson* stated in *Engel v. Vitale*, 370 U.S. 421, that the *Everson* case appeared to be out of line with the other decisions of this court in this area of the law.

The majority of decisions concerning free transportation for religious schools which have been decided since *Everson* have criticized the result in *Everson* while extolling the virtues of the principles set out in the opinions in that case. The greater number of state courts have agreed with Justice Jackson, who likened the majority opinion to Byron's Julia, who "whispering 'I will ne'er consent,'—consented."

In order to avoid the result in *Everson*, state courts have resorted to some hypocrisy in finding some provision in their state constitutions (even though they are nothing but an elaboration of the First Amendment) to strike down the legislation.[1]

2. The so-called "child benefit" theory, which has evolved from *Everson* is illogical and difficult to apply. Every element of the educational program of an institution is "primarily for the benefit of the child" and therefore, constitutional under that rationale. In the typical school system of today transportation is a very important part of the system. The state legislature of Pennsylvania has forced school districts to consolidate into regional systems which require the busing of pupils for greater distances than was necessary just a couple of years ago. Private and parochial schools have followed suit, and nearly all of them have acquired their own transportation systems. Obviously, the assumption of the expense of transporting pupils by the public school districts relieves the nonpublic schools of a financial burden. In *State v. Nusbaum* (supra, fn. 1) the Supreme Court of Wisconsin stated:

> "Those parochial schools, which now pay part or all of the cost of transportation of their pupils out of

1—See, for example, *Matthews v. Quinton*, (Alaska), 362 P. 2d 932; *Board of Education v. Antone*, (Okla.), 384 P. 2d 911; *Squires v. Inhabitants of City of Augusta*, (Me.), 153 A2d 80; *State v. Nusbaum*, (Wis.), 115 N.W. 2d 761; *Visser v. Nooksack Valley School District*, (Wash.), 207 P. 2d 198; *Judd v. Board of Education*, (N. Y.), 15 N.E. 2d 576; *Traub v. Brown*, (Dela.), 172 A. 835; *McVey v. Hawkins*, (Mo.), 258 S.W. 2d 927.

their school funds, stand to benefit financially by the operation of the new act. Others stand to gain through increased enrollment. Such an increase in enrollment is a benefit to these parochial schools.

"It must be conceded that there are benefits to religious organizations and parochial schools resulting from the expenditures of public funds which are not a violation of this constitutional prohibition. Examples are the providing of police and fire protection, the supplying of water and sewerage services on a basis whereby the cost of the system or service is not charged to the users, and the building and improving of public sidewalks and streets. However, all of these public services are provided to the public or the property, generally on a basis whereby no classification is made as to the religious organizations or schools. It is this which distinguishes these benefits from those sought to be conferred by the instant act. Mr. Justice Jackson pointed out this line of demarcation in his penetrating dissenting opinion in *Everson v. Board of Education,* (citation) in these words:

> 'A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church."

The following portion of *Judd v. Board of Education* (supra, fn. 1) has been quoted with approval by several courts:

> "Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations.' State ex rel. Traub v. Brown, 6 W.W. Harr., 36 Del. 181, 172 A. 835, 837, writ or error dismissed Feb. 15, 1938, Del. Supp. 197 A 478. Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing books, accommodations and other facilities are such an aid."

In the words of Justice Cohen of the Pennsylvania court (Appendix E, page 64a):

> "The act in question violates, in my opinion, both the Pennsylvania Constitution and the Federal Constitution, and is further void for vagueness and incompleteness. Moreover, it is premised upon the subterfuge of the 'child benefit' theory, . . . * * *
>
> "Regarding the First Amendment, I recognize the apparent binding effect of *Everson v. Board of Education*, 330 U.S. 1 (1947). However, I believe that certain more recent statements of the Supreme Court have to a great extent diminished the force and impact formerly enjoyed by *Everson*. [citing *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1947); *Torasco v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421

(1962); and *Abington School District v. Schempp*, 374 U.S. 203 (1963)]

"* * * I should like the United States Supreme Court finally to decide this case so that they may reconsider the *Everson* doctrine."

3. The only basis for sustaining the constitutionality of the busing law is that it is primarily a law providing for the safety of children. That safety is not the principal consideration in busing school children in Pennsylvania is obvious from a reading of the provisions in the code for busing.

An examination of other provisions of the School Code indicates that safety was not the predominant motive for the passage of this act. Art. XXV, Sec. 2541 of the Public School Code provides for the reimbursement to predominantly rural school districts for the cost of transportation of pupils to schools. That section provides for state reimbursement to school districts for the transportation of elementary school pupils who live more than one and one half miles from their schools and for high school pupils who live more than two miles from their schools. This section would, of course, apply to pupils transported to private and parochial schools under Act 91. This shows very clearly that the legislature has not been motivated by a concern for the safety of pupils, but by the practical necessity of transporting pupils who live too far from their schools to walk.

If safety were the criterion, then pupils living in the more populous areas would also have to be transported. Everyone knows that city streets are much more dangerous to the safety of children than are country roads. Hundreds of thousands of pupils walk the treacherous streets of Philadelphia and Pittsburgh every day on their way to and from school.

The statute itself is designed to increase the hazards of children who were previously transported from their homes to private or parochial schools by private buses or autos. The act says: "Such pupils shall be transported to and from the point or points on . . . [established public school bus] routes nearest or most convenient to the school which such pupils attend."

This provision ignores completely the hazards at the points of intake and discharge of the pupils. It utterly disregards the hazards and perils that might be present from such points to the home and schools of such pupils. How can such a provision provide for the welfare and safety of students who previous were transported from their homes to their schools? Obviously it cannot; it can only make their journeys less safe.

Moreover, nonpublic school children who do not live near an established bus route will still face the same traffic hazards as they did before. Therefore, it can hardly be claimed that the framers of the act had in mind in any degree the welfare of the children whose exposure to traffic hazards may or may not be reduced and perhaps might be increased. It can hardly be claimed that this haphazard approach to the "safety" problem is intended to be a welfare measure to assist the child.

When faced with a similar set of facts, the highest court of Alaska noted:

> "But this intent of the legislature to protect the health and safety of all school children in Alaska was not carried out in the statute erected. The only nonpublic school children entitled to free transportation under Chapter 39 are those who must travel comparable dis-

tances and the same routes over which the children attending public schools are transported. In other words, nonpublic school children who are fortunate enough to be living along a public school bus route are given transportation. All other nonpublic school children living within the two mile compulsory attendance limit and more than one and one-half miles from their school are left to fend for themselves.

"It cannot be truthfully said that the severe winter weather and the highways without sidewalks around Fairbanks are less hazardous to the health, welfare and safety of the nonpublic school child who does not live along a school bus route and therefore has to walk to school than to the health, welfare and safety of his classmate who rides because his home is along the route. Nor can anyone say that the public school first grader, who lives 1.49 miles from his school and has to walk will feel the cold less than, and not have to face the same traffic risks as, an older sixth grader of the nonpublic school who gets to ride on the public school bus because he lives along the bus route and at a distance of 1.51 miles from the nonpublic school of his choice.

* * * All we are saying at this time is that Chapter 39 does not effectuate the intent expressed therein of the legislature.

"Turning now to the argument that the transportation of school children to nonpublic schools on public school buses is of direct benefit only to the child, we say again that, in our opinion, the furnishing of such transportation at public expense constitutes a direct benefit to the school. This was the view expressed by the courts of Delaware, New York, Oklahoma, Washington and Ken-

tucky, and it was the view favored by the dissenting jurists in Maryland, Louisiana (in a textbook case), and New Jersey, where the state courts have adopted the child benefit theory, and by the four disenting Justices of the United States Supreme Court in *Everson v. Board of Education.* Said Mr. Justice Rutledge in the Everson case:

'Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden. Now as always the core of the educational process is the teacher-pupil relationship. Without this the richest equipment and facilities would go for naught. See Judd v. Board of Education, 278 N. Y. 200, 212, 15 N.E. 2d 576, 118 A.L.R. 789. But the proverbial Mark Hopkins conception no longer suffices for the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be maintained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without.

'For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it is not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less essential to education, whether religious of secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be drawn is one between more dollars and less. Certainly in this realm such a line can be no valid constitutional measure.'

4. The only reason for the existence of religious schools is to teach religion. The secular education provided, even though it may consume the greater part of the school day, is required by state law. But it is the religious instruction that is the reason for being of religious schools. Many taxpayers disagree with the doctrines of one or more religious bodies. No one should be compelled to help support institutions that teach religious tenets with which he disagrees. Madison, in his famous "Memorial", said that it was "sinful and tyrannical" to compel a man to contribute money to propagate opinions which he disbelieves. He further said,

"It is proper to take alarm at the first experiment on our liberties."

Many Americans are alarmed at what seems to be an ever-widening breach in the wall of separation between church and state. Political expediency has clouded principle, and only this court can clarify the law on this vital issue.

In the case at hand public property is being used to advance sectarian religious causes contrary to the prohibition established by the founding fathers. At least, in the *Everson* case, no public property was used for the transportation of pupils to religious schools, but here the public school buses are being used at the direction of the state legislature. The state has departed from the position of neutrality and is actually supporting religious institutions.

5. The act in question is so vague and indefinite that it violates the due process provision of the Fourteenth Amendment to the constitution.

The Pennsylvania statute requires school districts to provide free bus transportation for pupils who attend "nonpublic elementary and high schools not operated for profit." Such transportation is to be furnished "over established public school bus routes." The pupils are to be transported to and from points on such routes "nearest or most convenient to the schools which such pupils attend."

Nowhere are these terms defined. The Pennsylvania Attorney General advised the Department of Public Instruction that bus routes could be "reestablished to better accommodate nonpublic school pupils and that the public school system could acquire or lease buses from nonpublic schools.

The place of residence of the "pupils" is not limited, which results in taxpayers paying for transportation of nonresident children to private schools in the district. Depending upon the interpretation of the Act, taxpayers in a given district could find themselves burdened with a huge financial obligation for transporting children within their district even though most or all of them did not live in the district.

This court has declared statutes null and void because of vagueness. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Yu Cong Eng. v. Trinidad*, 271 U.S. 500 (1926); *Winters v. New York*, 333 U.S. 507 (1947); *Stromberg v. California*, 283 U.S. 359 (1931); *Herndon v. Cowry*, 301 U.S. 242 (1937). See also *Note, The Void-For-Vagueness Doctrine*, 109 U. of Pa. Law Rev.. 67 (1960).

Taxpayers are entitled to clearly defined boundaries for which their money is to be spent. Administrators should not be given carte blanche with tax funds. The authority to expend tax monies should not be delegated to administrative boards, but should be clearly circumscribed by statute.

As Justice Cohen pointed out in his dissent, "the Attorney General assumed the role of our overseer of the legislature and rather than interpret the act, saw fit to write his own version simply because the statute passed by the General Assembly was incomplete and unworkable." (p. 4 Appendix E) 66a

For the foregoing reasons petitioner respectfully requests the court to grant the prayer of this petition.

APPENDIX

OPINION OF THE COURT

MUSMANNO, J. FILED: January 17, 1967

The Act of June 15, 1965,[1] amending Article III, Section 1361 of the Public School Code of 1949,[2] provides, inter alia:

> "When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend non-public elementary and high schools not operated for profit."

On August 30, 1965, Brenard G. Rhoades and five others filed a suit in equity in Montgomery County, averring that the Act of June 15, 1965, known as Act No. 91, was unconstitutional, unlawful and invalid, and asking that the Court enjoin the defendant School District of Abington Township from entering into any contract under the indicated legislation.

On September 1, 1965, Betty J. Worrell filed a similar suit in Delaware County against the School Directors and Officers of Rose Tree Union School District. The Attorney General of the Commonwealth petitioned this Court to take original jurisdiction in the two equity actions and we issued certiorari to bring the actions before us for disposition. The Attorney General intervened in both actions, so did other parties, all of whom filed answers and briefs. All counsel

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1—Act No. 91, P.L. ....., 24 P.S. §13-1361.

2—Act of March 10, 1949, P.L. 30, 24 P.S. §13-1361.

participating in the argument, both orally and by printed brief, have presented their positions ably and vigorously.

The issue is one on which adversaries feel deeply, although in reality the opposing points of view do not bristle with as much contention as might at first appearance seem likely. The plaintiffs[3] and those who support their position see in Act 91 an infringement on the First Amendment to the Federal Constitution and to Article I, Sec. 3; Article III, Sections 17 and 18; and Article X, Sections 1 and 2 of the Pennsylvania Constitution.

The purpose of Act 91, as announced in its title, is to provide for the "health, wealth and safety of the children of the Commonwealth." The phrase "health, wealth and safety" is not to be treated lightly or as a superfluity. "The Legislature cannot be deemed to intend that its language be superfluous and without import." (*Daly v. Hemphill*, 411 Pa. 263.)

The larger number of schools in Pennsylvania are located so far away from the homes of the pupils who attend them that the pupils are required either to walk long distances or to make use of vehicular transportation. In recent years the foot traveler, because of the volume of motor traffic which more and more is approaching the grim appearance of a foreign invasion, is in constant jeopardy of death or physical disablement, as he proceeds, warily or carefreedly over the highways of the nation. And those who ride in private cars can never be certain, because of the ever-increasing violence and number of collisions, that they will

3—To avoid a cumbersome distinction, wholly unnecessary in the discussion, between the suit filed in Montgomery County and the one filed in Delaware County, the parties arguing for the unconstitutionality of Act 91 will be called in the opinion, the plaintiffs.

arrive at their destinations with only the ailments they enjoyed when they started on their journeys.

Testimony before a United States Senate Committee advanced the dire prediction that:

> "It seems probable that over the next 5 years we will kill on the highways of this country as many people as we lost to enemy action in all four years in World War II. In the next decade, we can expect to kill more than 500,000 people and injure about 40 million." (89th Cong. 2d Sess. 112 Cong. Rec. 6576.)

In view of the peril hovering over our streets and roads like a miasmatic fog, those charged with concern for the safety of children are duty bound to devise methods and means for saving the little travelers from harm on their way to and from school. Obviously the manner in which to provide these youthful wayfarers with a fair measure of protection against highway mishap is to keep them pedally off the roads and to transport them in vehicles so formidably constructed that they may ward off and parry, to the maximum extent possible, aggression from other vehicles. The school bus with its large heavy wheels and steel fabricated body seems to be the answer to the worrisome problem. Pennsylvania Secretary of Public Welfare, in testifying on House Bill 381 (later to become Act 91) before the Senate Education Committee, said:

> ". . . school bus transportation clearly involves the safety and health of our children. The busing of school children is for their protection against hazards of the roadways and of traffic, against dan-

gers occasioned by exposure to weather, against evils of child molestation."[4]

He stated further that "with respect to injuries," a person is five times as safe in a school bus as in a car. With respect to death, a person is ten times as safe in a school bus as in a car." In support of this statement, he cited statistics: "In 1963, there were 2.3 deaths, per 100,000,000 miles, in cars, as compared to .2 deaths per 100,000,000 miles in school buses."

The need for the collective motorized transportation of school children is thus as apparent as a washed-away bridge. The opponents of Act 91 do not contest the desirability, indeed even the imperativeness, of transporting children to school by means of school buses, but argue that they may not be used to ferry children attending nonpublic schools which, of course, include parochial schools. They point to the First Amendment to the Constitution of the United States which declares, inter alia, "Congress shall make no law respecting an establishment of religion,"[5] and argue that Act 91 offends against it.

Despite the wondrous flexibility of the English language it is still difficult to see how one can conclude that, placing children on a school bus establishes a religion. And even if the children are transported to a school which, in addition to teaching state-approved subjects, offers guidance in the

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4—Hearings before Senate Education Committee 14-16 (March 24, 1965).

5—The Supreme Court of the United States has held that the First Amendment has been made wholly applicable to all the States by the Fourteenth Amendment. *(School District of Abington Township v. Schempp,* 374 U.S. 203).

world of faith, this still does not establish a religion. Our whole body of school law is predicated on the proposition that once children are served educationally according to State criteria, their extra-curricular activities cannot adversely affect the State, constitutionally. Indeed, the Pennsylvania School Code specifically embraces the concept of nonpublic schools, the title explaining that the law relates to "the public school system, including certain provisions applicable as well to private and parochial schools."

In his concurring opinion in the case of *McGowan v. Maryland*, 366 U.S. 420, 467, Justice Frankfurter said:

> "It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State . . . , that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment', even though such expenditure may cause some children to go to parochial schools who would not otherwise have gone."

Pennsylvania State laws compel all children up to 18 years of age to attend school—not public school, but *any* school so long as it teaches an approved curriculum and meets other State requirements. The State awards to nonpublic school students the same scholastic credits as those which are earned by public school sudents. It would be grossly illogical, therefore, to say that the State which does not differentiate between public and nonpublic pupils, so far as grades, promotion, and graduation are concerned,

cleaves a line of distinction between them according to whether they arrive at the school on school buses, in private motor cars or on foot.

Not only do law and reason refute any such differentiation, but economics in good government dispels the concept. The huge budgets required to maintain our public school system is a matter of concern to everybody. The imperative need for the best in education for the youth of our Commonwealth convinces the civic-minded citizens of the inevitability of heavy taxes to meet the expense, but it does not lessen the weight of the financial burden he must carry. Therefore, any procedure which may lighten that burden, consistent with maintaining the highest State educational standards, is warmly welcomed by the taxpayers. Thus, for every nonpublic school pupil picked up on the road by a public school bus, that much weight is lifted from the back of the taxpayer because the maintenance of non-public schools, of course, does not depend upon public funds.

Nearly one-fourth of the school children in Pennsylvania attend nonpublic (mostly denominational) schools. Since the parents of the children in nonpublic schools still pay public school taxes, without using public school facilities, it has been estimated that the taxpayers, since they are not required to provide teachers, equipment and supplies for the nonpublic school children, are financially benefitted to an amount equal to one-third of the entire educational budget of the Commonwealth.[6] Indeed, if nonpublic schools were

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6—General Fund Budget Message of Governor William W. Scranton, February 7, 1966 (b) 1966-1967 BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA (c) "Current Expenditure Per

to be abolished, the increase in tax burden to the citizens of the Commonwealth would be noteworthy and the Commonwealth would be hard put to provide the buildings, teachers and equipment for the flood of additional children released into their care and responsibility.

Where children are involved, the laws of the Commonwealth and the decisions of our Courts make no distinction between public school and nonpublic school pupils. In 1911 the Pennsylvania Legislature enacted a law[7] providing for the establishment of manual training schools for all children, public and nonpublic. It specifically stated that

> "No pupil shall be refused admission to the courses in these additional schools or departments, by reason of the fact that his elementary or academic education is being or has been received in a school other than a public school."

When a 13-year-old pupil of a private school endeavored to obtain this manual training, taught in a public school in Altoona, the school district involved refused him admittance, arguing that the Act was unconstitutional in that it would give "to private and sectarian schools the use of money raised for public schools, contrary to Article IX, Sec. 7 and Article X, Sec. 2 of the State Constitution. The Act specifically stated that the manual training school was to be "an integral part of the public school system in such district." Despite this language which went much further in linking public and private schools in an educational undertaking

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Pupil, Average Daily Membership for Selected States", 1965-1966, Table 17 p. 20, Volume 4, SELECTED EDUCATIONAL STATISTICS, Bureau of Statistics, Department of Public Instruction, Commonwealth of Pennsylvania (1966).

7—S. C. 401, Act of May 18, 11, P.L. 309.

than Act 91 here being discussed, our Court held that the Act was constitutional, stating:

> "The benefits and advantages of these additional schools and means of education and improvement are not restricted to the pupils in regular attendance at the elementary public schools and pursuing the entire prescribed elementary schools, but are intended to be free to all 'persons residing in such district' . . ." (*Comm. v. School District of Altoona*, 241 Pa. 224.)

If the pupil of a private school may attend a manual training school, which by law has become part of the "public school system", certainly he may not under the present law, be excluded from a bus which in itself, stationary or mobile, is not a classroom for instruction.

The Public School Code provides for children, without distinguishing between public and nonpublic schools, many facilities, as, for instance, medical, dental and nurse services (Section 14-1401 et seq.); driver safety (Section 15-1519); food and milk supply (Section 13-1335); board and lodging (Section 13-1367), tuition and maintenance of blind, deaf and cerebral palsied children (Section 13-1376). The School Code provides that school district funds may be used for traffic safety purposes:

> "The board of directors of any school district acting alone or with another district or districts, may contribute funds to another political subdivision for the erection and maintenance of stop and go signal lights, blinkers or other like traffic control devices." (1949, March 10, P.L. 30, Art. V, Sec. 526, added

1965, Dec. 1, P.L. ....., No. 369, Sec. 1, 24 P.S. Sec. 5-526).

On the basis of logic and sustained reasoning it would be absurd to allow nonpublic school children into all these public services but deny them a ride on a bus to attend a school conforming to the requirements of the State educational program.

But the plaintiffs in the Montgomery County case argue that Act 91 is unconstitutional because five of the schools that educate children riding the school buses are owned and operated by the Roman Catholic Church and that, therefore, the plaintiffs contend,

> "a primary and direct effect of the expenditures necessary or reasonably attendant upon such maintenance and operation is to advance the Roman Catholic Church, the particular local Roman Catholic Churches, and the religion thereof."

This same argument was pressed in the case of *Everson v. Board of Education*, 330 U.S. 1, where the constitutionality of a New Jersey statute was attacked because it authorized reimbursement to parents for fares paid for transporting by public carrier children attending public and Catholic schools. The Supreme Court of the United States ruled that the statute did not offend against the Federal Constitution:

> ". . . we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public *and other schools*. It is undoubtedly true that children are helped to get to church and schools. There is

even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment." (Emphasis supplied.)

The United States Supreme Court found that the parochial schools there under consideration met New Jersey's school requirements. The State contributed no money to these schools; it did not support them. The legislation which provided for the busing of the parochial children did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." Therefore, the law was not at odds with the First Amendment. The same is true of Pennsylvania's Act 91. In its discussion the Supreme Court referred to the case of *Pierce v. Society of Sisters*, 268 U.S. 510. There, the State of Oregon had passed a law requiring parents, under penalty of punishment for disobedience, to send their children to public schools. The Supreme Court held that such a law constituted an unreasonable interference with the liberty of parents and so violated the Fourteenth Amendment. The Court said:

> "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (p. 535).

Commenting on the *Pierce* case, the Supreme Court said in the *Everson* case:

> "Parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has the power to impose." (p. 18)

The Supreme Court also pointed out that the First Amendment, in addition to abjuring the establishment of religion, also declared that there must be no prohibition in the "free exercise" of religion. Thus, while government may not use a legislative tool to build a church, neither may it employ a parliamentary bulldozer to demolish a church already constructed. "The prohibition that the State may not offer aid to the institution of religion, applies just as strongly in the other direction, that is, it may not offer harm to religion." (Everson, supra, p. 18)

Religion is part of the American way of life. Beginning with the landing of Columbus on the shores of San Salvador when the Genoese navigator offered prayers of gratitude to God for the faith which sustained him in the preparation for, and the perilous achievement of, his hazard-laden voyage, continuing through the Mayflower Compact which is headed by the solemn and sacred words: "In the name of God Amen!" and calls upon the Deity for guidance and support in the new life to begin on the American continent, carrying on through the Declaration of Independence and the Constitution of the United States in their reverent supplication to a Supreme Being, and standing fast in State papers and the pronouncements of our Presidents, religion is inseparable from the history of the United States. The United States Supreme Court said in the case of *Abington School District v. Schempp*, 374 U.S. 203, 213:

> ". . . This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, 'So help me God.' Likewise each House of the Congress provides through its

> Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership. Bureau of Census, U. S. Department of Commerce, Statistical Abstract of the United States, 48 (83d ed. 1962), while less than 3% profess no religion whatever. Id., at p. 46. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his . . . blessings . . .'"

Even Justice Rutledge, writing the dissent in the *Everson* case, acknowledged that:

> "Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise." (p. 52)

Every daily session of the Courts of this Commonwealth open with the adjuration: "God save the Commonwealth and this Honorable Court." Each witness who takes an oath in all our Courts is required to avow that he will tell the truth, the whole truth, and nothing but the truth, for which he will answer "on the last Great Day." At

patriotic ceremonies where the national anthem is sung, the citizens lift their voices to the words: "This be our motto 'In God Is Our Trust'." The Pledge of Allegiance to the Flag of the United States proclaims "One Nation under God."

The constitutional prohibition against the establishment of religion was never intended to deny the free exercise of religion. Thomas Jefferson, who penned the Declaration of Independence, and who also wrote Virginia's Bill for Religious Liberty, proclaimed the omnipotence of the Author of the Universe:

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plans of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . ."

Any interpretation of legislation, therefore, which would deny the fullest voluntary freedom in religious worship would not only be contrary to these American historical expressions of faith, but would also offend against the First Amendment with its bell-clanging proclamation of religious freedom. It was because the Founding Fathers foresaw the possibility of forces and influences working to destroy the faith of man in a Supreme Being that they made the free exercise of religion part of the same swing of the pendulum which prohibits the establishment of a State religion.

In *Zorach v. Clauson*, 343 U.S. 306, the Supreme Court said:

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other . . . We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary . . . We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

From this same pulpit of American historical exposition, the Supreme Court declared in *Everson:*

> ". . . New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."

Act 91 is public welfare legislation and, from the reservoir of public welfare, all races and religions may drink unimpededly in the quenching of normal thirsts. Indeed one of the fundamental reasons for the State in a civilized society is to provide for the public welfare.

The *Everson* case is the law of the land and rules squarely against the contentions of the plaintiffs in the Courts below in so far as the Federal Constitution is concerned. Our own Court upheld the *Everson* case by name

in 1956 in *Schade v. Allegheny County Institution District*, 386 Pa. 507. In that case an attempt was made to declare unconstitutional the Juvenile Court Law of Allegheny County of June 3, 1933, P. L. 1449, and the County Institution District Law of June 24, 1937, P. L. 2017 because they provided for the payment of tax revenues raised by Allegheny County to denominational or sectarian institutions or homes for the board, care and maintenance of neglected or dependent children on order of Allegheny County's Juvenile Court. The complaining plaintiffs argued that these laws violated the Pennsylvania Constitution which prohibits appropriations "to any denominational and sectarian institution, corporation or association." This Court rejected the contention of the plaintiffs that the payments to the denominational or sectarian defendants tended toward "governmental 'establishment of religion', and, consequently are violative of the Fourteenth Amendment." Mr. Justice Jones, speaking for our unanimous Court, said:

> "It it unnecessary to devote much time to this contention. The Supreme Court has, in principle, settled it adversely to the appellant's position. See *Everson v. Board of Education*, supra, where it was held that a State's use of public tax funds for the transportation of pupils to and from sectarian schools did not serve to promote the establishment of religion."

We here hold that Act 91 does not offend against the First or Fourteenth Amendment to the Constitution of the United States. Does it transgress any provision or provisions of the Constitution of Pennsylvania? We have already touched on certain phases of the State Constitution in con-

nection with a discussion of alleged trespassing on the domains of the United States. We will now examine specifically the argument that Act 91 cannot survive under prohibitory provisions of our own State organic law.

The plaintiffs contend that Act 91 violates Art. 1, Sec. 3 of the State Constitution:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case, whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship."

The Abington Township brief asserts precisely that Act 91—

> "compels all the real property owners of the Township to support places of worship and to maintain a particular religious ministry against their consent; and (2) it gives preference by law to certain religious establishments and modes of worship."

These assertions are so feeble of merit that they must fall in the slightest breeze of analysis. When the Constitution of 1874 was being debated in convention, no reference was made to the subject of pupil transportation. Supporting a place of worship meant providing funds for the maintenance of a church. The phrase certainly could not have referred to motor transportation. The concept of a horseless

buggy was as unimaginable in 1873, as walking on air 150 miles above the earth was inconceivable in 1946. The first automobile to awe human beings, excite communities and startle animals did not honk a horn or turn a wheel until 1892. Thus, it can be stated with historic conclusiveness that the framers of the 1874 Constitution could not have had in mind a prohibition against motor transportation for children when they declared that no citizen of the State should be required to support a place of worship.

Even in quixotic imagination, a school bus cannot be regarded a place of worship. The general gayety, levity and juvenile frivolity which prevails among children riding any transportational vehicle rules out the solemnity of a place of worship. Nor can transporting a child to a church-connected school be regarded as supporting a place of worship. The purpose of the school bus is to take children to a structure where they will receive a secular education. Thus the bus serves a secular, public purpose, and as stated in *Everson*, "it is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."

The fact that the parochial pupil, in addition to receiving a secular education, is offered religious guidance, cannot take away the public nature of the curriculum he studies—a curriculum drafted and supervised by the State. The Supreme Court explained in *Everson* that "it does not follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program."

The plaintiffs' assertion that Act 91 "gives preference by law to certain religious establishments and modes of wor-

ship" is self-defeating on its face because there is nothing in the Act which speaks of preference for nonpublic schools. Indeed the Act states that the buses on which the nonpublic school pupil may ride "shall be over established public school routes." Thus, while nonpublic students eventually reach the nonpublic school, there is no provision that the bus is to take them to the doorstep of that school, or that the bus will pick them up at their homes. So far as nonpublic school children are concerned, they must, in a universal Mohammed sense, go to the buses rather than that the buses come to them.

It is also to be noted particularly that Act 91 makes no special provision for parochial schools. It applies all-sweepingly to children attending nonpublic schools, whether those schools have an association with a church or not. In addition, it is significant that the nonpublic schools will not be the donee of funds or busing facilities, nor will they have any control over them.

The plaintiffs do not charge that nonpublic schools would, under Act 91, be the recipient of financial benefits. But even if this were to be an indirect result of the legislation, this fact in itself would not unconstitutionalize the law. In order to come within the constitutional ban, financial benefits accruing to a nonpublic school would have to be direct and not merely incidental, supplemental or peripheral. In *Gallatizin Borough School District*, 164 Pa. 629, the complaining party sought to enjoin a school district from employing as teachers members of a religious order who contributed all their earnings, above their maintenance, to the religious order of which they were members. This Court rejected the complaint, stating through the scholarly Justice Dean, that:

> "It is none of our business, nor that of these appellants, to inquire into this matter. American men and women, of sound mind and twenty-one years of age, can make disposition of their surplus earnings as suits their own notions. We might as well, so far as any law warranted it, inquire of a lawyer, before admitting him to the bar, what he intended to do with his surplus fees, and make his answer a test of admission. What he did with his money could in no way affect his right to be sworn as an officer of this court, therefore it would be impertinence for us to inquire."

The plaintiffs find in Act 91 a violation of Article 3, Section 18 of the Pennsylvania Constitution, which reads, inter alia:

> "No appropriations shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association."

In *Schade v. Allegheny County Inst. District,* supra, we affirmed the statement of the Court of Common Pleas of Allegheny County that:

> "The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a governmental duty."

Educating the children of the state is a governmental duty, and, if excessive distance builds a wall around the place of education, government must level that wall.

Moreover, Act 91 does not require any appropriation from the Commonwealth. In fact, the Abington Township School District admits this in its brief:

> "The draftsmen of the Act No. 91 of June 15, 1965, drew it so that the appropriations are and will be made, not by the General Assembly, but by instrumentalities thereof (school boards). Further, the Act is drawn so that no money passes directly from the state or from its instrumentalities into the treasury of any sectarian institution."

Although Abington cites the *Schade v. Allegheny County Inst. District*, supra, in support of its contentions, we have seen that it is a sword against those contentions rather than a shield for it. Our Court ruled that the payments made to the institution supporting neglected children is "in legal effect payments to the child." The school buses under Act 91 are operated for the benefit of the children who ride it and not for the benefit of the church which may be associated with the school in which the children receive a State-supervised education.

A public fire department is maintained by the taxes of the people, but no one would be so shortsighted as to argue that firemen had no duty to extinguish a conflagration which was consuming a church, no matter what the denomination. Policemen are assigned to duty at and about churches but no one would say that this is an illegal assignment of duty. Churches and religious establishments, regardless of creed, form part of the whole mosaic of our civilized society and should, and do, receive the protection of the State of their physical properties. "The Constitution does not prohibit the State or any of its agencies from doing business with

denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval. Numerous cases can be readily visualized where such situations have occurred: i.e. payment of the bill of an injured employee to a sectarian hospital." (*Schade v. Allegheny County Inst. Dist.*, supra, p. 512).

The Abington brief cites Article 10, Section 1 of the State Constitution:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated . . ."

and argues that this destroys the constitutionality of Act 91. It does not even approach within firing range of Act 91. The constitutional provision in question mandates the Legislature to provide for the establishment "of a thorough and efficient system of public schools," but it does not say that there may not be schools supplemental to those supported by the State. If this constitutional provision prohibited the creation or existence of other schools, then every private school in the State would have to be dismantled, which, of course, would be absurd.

> Section 2 of Article 10 states that:
> "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

Abington sees in this section another bulldozer crushing out the life of Act 91, but Abington itself throws the bulldozer off its track with its own statement, namely,

> "One section of the Public School Code, viz., sec. 1401, relating to school health services, does extend to children in private schools and results in public expenditures for the benefit of all children of school age, whether they attend public or private schools. Of course, the health of all children residing within the Commonwealth is a matter of legitimate concern of the General Assembly . . . Programs such as health and dental examinations for all children of certain ages are unrelated to the 'support of any sectarian school'."

Indeed, under existing law, children in sectarian schools receive tax-supported health services. (Act of July 15, 1957, P.L.; Sept. 29, 1961, P.L. 1743; 24 P.S. 14-1401 et seq.)

If the health of *all* children in the Commonwealth is a matter of legitimate concern of the General Assembly, why would not their safety also be a matter of legitimate concern of the General Assembly? As already quoted, Arlin M. Adams, the Pennsylvania Secretary of Public Welfare, said:

> "The busing of school children is for their protection against hazards of the roadways and of traffic, against dangers occasioned by exposure to weather, against evils of child molestation."

If the General Assembly can act and appropriate to save children from the onslaughts of diphtheria, smallpox and other infection diseases, is it impotent to protect them from the pneumonia-provoking blasts of winter, the mangling fenders of a drunk-driven automobile, and the lecherous advances of the depraved molester?

We have seen that the bus transportation authorized by Act 91 must traverse routes which lead to public schools. Are parochial children on these routes to be left to the mercies of inclement weather, culpably negligent drivers and children disturbers? In not a few instances the school buses picking up only public school children travel with many empty seats. Is a nonpublic school child to be denied a seat in an unfilled bus, leaving him to plod the weary miles on foot? With such school buses on the road, expending no extra gasoline to pick up nonpublic school children, are they to return home and ask their parents for private transportation beyond their means to supply?

In all the briefs which have been filed in opposition to Act 91, there is not one statement or word remotely suggesting that the transportation of nonpublic school children will in the slightest be deleterious to the public, the individuals involved, or the educational program of the State. On the contrary, we have seen how this school busing will be protective of the health and the safety of the children. In addition, such busing will be salubrious and educational for the children in that public and nonpublic school children will mingle, converse and soon learn that children are the same everywhere. These youthful riders, regardless of religious attachments, speak the same language, salute the same Flag, play the same games, laugh at the same jokes, entertain the same love for their respective parents, and demonstrate the same devotion to the ideals of our country. All this comes under the canopy of preserving the health, welfare and safety of the children, one of the most fundamental responsibilities of the State, and specifically provided for in the Public School Code of the State.

Paradoxically, the plaintiffs argue that Act 91 goes too far and then, that it does not go far enough. They complain that the statute does not provide for transportation of children who live close to their schools. But if the school is close enough to walk to, why must there be vehicular transportation? Sufficient to a trip is the distance thereof.

Then the plaintiffs say that students attending private schools for profit are omitted from the statute. In cases of private schools where education is imparted, on a profit basis, it can be assumed that if the parents or guardians can afford expensive special tutoring for their children, they can afford to provide private safe transportation for their children.

The brief filed in behalf of the plaintiff in the Delaware County case complains that "nonpublic school children who do not live near an established bus route will still face the same traffic hazards as they did before." The obvious answer here is that if these students are confronted with such dangers as will justify extending the scope of the Act, the General Assembly can provide for that extension, but it is no reasonable argument to say that because a statute does not make provision for a hypothetical minimal hazard, it should ignore a proved multiple peril.

This same brief argues that there is no analogy between bus transportation and the provision for lunches and medical care for nonpublic school children, specifying: "Lunch and medical care are things which a child must have, irrespective of whether or not he attends school." In our society it is accepted that food for the mind in the form of education is no less necessary than food for the stomach. With regard to medical care, the supplying of bus transportation may be

the means of protecting children from illness-producing exposure which would lessen the need for medical care.

It was also argued before us that Act 91 will "accelerate the fragmentation of our society and increase religious conflicts." The exact reverse is true. The closer different religions get to one another, the less will be the reason for dissension. We can take judicial note of the fact that in recent years noble efforts have been made in establishing inter-faith councils, leading to the hope fulfillment of wiping away antagonisms between different churches and beliefs. Bringing children together in buses on their way to the temple of learning can only help to hasten the eventual attainment of the true brotherhood of man. The friendships made by children as they travel side by side and in conversational intimacy, to and from school and home, in the most formative years of their lives, will grow stronger with the passing of the years, increasing the mutual understanding which is the most potent welder in a common cause for peace and happiness.

Finally, the plaintiffs argue that Act 91 is unconstitutional because of "vagueness." The only thing vague in this entire situation is the charge of vagueness advanced by the plaintiffs. It is like a splash of rain that has no target and leaves no durable impression. A reading of Act 91 will reveal its stark simplicity, specificity and secularization. It has but one aim and that is to place nonpublic schools, in the matter of student transportation, in the same classification as public schools, so long as the nonpublic schools observe the public school curricula. There is nothing in either the Federal or State constitution, the laws of the Commonwealth, or in fundamental justice to prohibit so salutary an objective.

The Complaints in the courts below are dismissed, each party to pay own costs.

Justice Jones files a concurring opinion.

Justice Roberts files a concurring opinion in which Justices Jones, Eagen and O'Brien join.

Chief Justice Bell files a dissenting opinion.

Justice Cohen files a dissenting opinion.

CONCURRING OPINION

ROBERTS, *J.* FILED: January 17, 1967

The thrust of plaintiffs' attack on the Act of June 15, 1965, P.L. , 24 P.S. §13-1361 (hereinafter referred to as Act 91) is that it violates the separation of church and state mandated by the Constitution of the United States and that it violates various provisions of the Constitution of Pennsylvania. I concur with view, shared by all but one member of this Court, that the *Everson* case forecloses this Court from holding that the statute violates the federal guarantee of separation. It is also my view that, even admitting that the statute will require the expenditure of additional funds for the bussing of school children, Act 91 does not violate the Constitution of Pennsylvania.

In asserting their challenge to the Constitution of Pennsylvania, the plaintiffs have invoked no less than the six following provisions of our constitution:

Article I, §3:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Article III, §17:

No appropriation shall be made to any charitable or educational institution not under the absolute control of the

Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

Article III, §18:

No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, that appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards, and for assistance to mothers having dependent children and to aged persons without adequate means of support, and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning, except that no scholarship grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

Article IX, §7:

The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

Article X, §1:

The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.

Article X, §2 :

No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian schools.

A harmonious reading of these six provisions forces me to an observation which I deem crucial to the setting in which the plaintiffs' challenge must be considered: Although Article I, Section 3 and Article X, Section 2 clearly establish a wall of separation between the Commonwealth and religious institutions, the more recently adopted Article II, Section 18[1] seems to contemplate certain instances in which public monies may properly be expended in the course of educational activities having a connection with church-related institutions. The last part of the proviso of Article III, Section 18, suggests to me state constitutional sanction for the payment of scholarship grants for higher education in those church-related institutions not teaching theology. I can see no other reasonable interpretation of Article III, Section 18's specific exclusion of theological schools and its silence on the matter of other programs conducted at institutions of higher learning.

That there are limits to the wall of separation erected by the Constitution of Pennsylvania is a conclusion which is not only required by constitutional language itself, but demanded by the practical realities of life in a modern interdependent community where there must of necessity be many points of contact between the agencies of government and all institutions, whether church-related or not. It is the inevitability of these points of contact which has undoubtedly permitted to exist, without significant successful challenge, the provision of many governmental services—fire, police,

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1—Amendment of November 5, 1963.

sewage—which in some sense benefit the conduct of religious institutions. Viewed in terms of hard realities, therefore, it is not the mere benefit to a religion which causes a service provided by government to violate our Constitution.

While provision of a general governmental service, which benefits a church-related institution, may not be for that reason alone unconstitutional, it is clear that for the constitutional language separating church and state to have the vital effect it was meant to have by its authors, there must be some areas and some services which government may not provide to religious institutions. The real difficulty is in gleaning from the sweeping phrases of our constitutional document the place where the line must be drawn.

The defendants in this case, as well as the opinion of the Court in the main rely upon the so-called child benefit theory to draw the line separating the constitutional from the unconstitutional. Given the presumption in favor of the constitutionality of acts of the Legislature[2] and given this Court's duty to accept, unless palpably unreasonable,[3] the Legislature's view as to the reasonable relation of statutes

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2—E.g., *Pritchard v. Williston Township School Dist.*, 394 Pa. 489, 493, 147 A. 2d 380, 383 (1959). "An Act of Assembly will not be declared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution," *Daly v. Hemphill*, 411 Pa. 263, 271, 191 A. 2d 835, 840 (1963); *Chartiers Valley Joint Schools v. Allegheny County Bd. of School Directors*, 418 Pa. 520, 546, 211 A. 2d 487, 501 (1965); *Milk Control Comm'n. v. Battista*, 413 Pa. 652, 659, 198 A. 2d 840, 843, appeal dismissed, 379 U.S. 3, 85 S. Ct. 75 (1964).

3—*Commonwealth v. Life Assur. Co. of America*, 419 Pa. 370, 214 A. 2d 209 (1965), appeal dismissed, 384 U.S. 268, 86 S. Ct. 1476 (1966); *Loomis v. Philadelphia School Dist. Bdg.*, 376 Pa. 428, 431-32, 103 A. 2d 769, 771 (1954).

to the public health, safety and welfare, I concur in the view that Act 91 is a safety measure whose object is the protection of children from road hazards. I also agree with the Court that such a conclusion is a crucial factor in determining the constitutionality of Act 91. It is my belief, however, that the constitutionality of legislation which benefits directly or indirectly a church-related institution may not be held constitutional merely because it is determined that the purpose or effect of the legislation is the welfare of children or, for that matter, any other proper object of legislative concern. Our Constitution's prohibition of any compelled support of a place of worship, maintenance of a ministry or preference of religion encompasses not only the proscription of financial aids to religion, but also any other governmental action creating special government approval of or involvement with religious activities.[4] And, the background of the Commonwealth's constitutional pronouncements on freedom of religion suggests strongly that prohibition of such aid to religion is, if anything, stricter than the proscription of financial aids.[5] Moreover, for such non-financial governmental involvement or approval to be constitutionally proscribed, a measure need not be as blatantly violative as a statute compelling weekly attendance at a house of worship. Far less overt forms of involvement and association would, in my view also be constitutionally void, and I can imagine measures which, though they arguably come within the child benefit theory, would

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4—See *Gobitis v. Minersville School Dist.*, 21 F. Supp. 581, 584-86 (E.D. Pa. 1937), decree entered, 24 F. Supp. 271 (E.D. Pa. 1938), aff'd., 108 F. 2d 683 (3d Cir. 1939), rev'd., 310 U.S. 586, 60 S. Ct. 1010 (1940).

5—21 Encyclopedia Americana 512-15 (1957 ed.); Buckalew, An Examination of the Constitution of Pennsylvania 5 (1883).

bring government and religious institutions in such close association as to constitute, by virtue of implicit sanction of the government presence, the proscribed "support", "maintenance", and "preference".[6]

Thus what is ultimately persuasive to me in the instant case is not only that Act 91 is a welfare measure, but also the fact that the transportation of students is, in the phrase of *Everson*, "so separate and indisputably marked off"[7] from functions in any sense associated with religion. In other words, though I accept the conclusion that not only actual teaching or religion, but also the conduct of many other programs in parochial schools, is infused with religious significance, it seems to me clear that the process of transporting parochial students in a public bus is so devoid of any psychological, let alone religious, significance, that it does not bring the government into an association with the school which implies the approval or sanction proscribed by our constitution. Indeed, the mere geographical distinctness of the facility being provided out of public funds and church-related institution underscores the lack of involvement of government with religion that Act 91 creates. The simple fact is that Act 91 does not even envision the use of a public facility within the confines of a religious institution; on the contrary, the language of Act 91 suggests that in many instances parochial school students will not even be carried to the doors of their schools.

6—Compare *Hysong v. Gallitizin Borough School Dist.*, 164 Pa. 629, 658-62, 30 Atl. 482, 484-86 (1894) (dissenting opinion). See also *Commonwealth v. Herr*, 229 Pa. 132, 78 Atl. 68 (1910) (per curiam).

7—*Everson v. Board of Educ.*, 330 U.S. 1, 18, 67 S. Ct. 504, 512-13 (1947).

Finally, I think it must be pointed out that the dissenting opinions are incorrect in their view that Act 91 is unconstitutional by virtue of its scheme of classification. It must be remembered that "courts may not question the wisdom of the legislative classification unless there can be found no reasonable ground for it"[8] and that "the reasonableness of the classification made is for the Legislature in the first instance."[9] The Legislature's exclusion of children attending schools operated for profit may have been motivated by a judgment that families of means sufficient to afford such schooling are not, like families of students attending non-profit schooling, deterred by cost from ensuring that their children travel to and from school by a safe method of transportation. I fail to see why that would not be a basis for classification, reasonable within this Court's above mentioned test. As to Mr. Chief Justice Bell's contention that Act 91's exclusion of children attending schools operated for profit reveals it as solely intended to benefit sectarian education, the answer is simple: Act 91 includes not only children attending sectarian schools not operated for profit, but also children attending *non*-sectarian, *non-public* schools not operated for profit.

MR. JUSTICE JONES, MR. JUSTICE EAGEN and MR. JUSTICE O'BRIEN join in this opinion.

8—*Loomis v. Philadelphia School Dist. Bd.*, 376 Pa. 428, 432, 103 A. 2d 769, 771 (1954). See *Commonwealth v. Life Assur. Co. of America*, 419 Pa. 370, 214 A. 2d 209, appeal dismissed, 384 U.S. 268, 86 S. Ct. 1476 (1966).

9—*Loomis v. Philadelphia School Dist. Bd.*, supra note 8 at 431, 103 A. 2d at 771.

CONCURRING OPINION

JONES, *J.* FILED: January 17, 1967

With the result reached by the majority of this Court I am in accord.

It is my opinion that the Act of June 15, 1963, P.L. ....., No. 91, 24 P.S. §13-1361, (amending Article XIII, Section 1361 of the "Public School Code of 1949", Act of March 10, 1949, P.L. 30, 24 P.S. §13-1361), which, "for the health, welfare and safety of the children of the Commonwealth", requires that school districts under certain circumstances provide free transportation for pupils attending nonpublic elementary and high schools not operated for profit, is valid legislation. The principal challenge to such legislation proceeds upon the theory that it is offensive to both the Constitution of the United States[1] and the Constitution of this Commonwealth.[2]

As to whether this statute violates the United States Constitution, the decision of the Supreme Court of the United States in *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504 (1947) is controlling: *Everson* compels the conclusion that the instant statute does not violate the First Amendment. As to whether this statute violates the Constitution of this Commonwealth I am of the opinion that it does not.

In this Commonwealth, the parents and guardians of children are compelled by law to send such children, up to a certain age, to school. In *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925), the U. S. Supreme Court has

1—Specifically, the First Amendment.

2—Specifically, Article I, Section 3, Article III, Section 18 and Article X, Section 2.

ruled that, if a parochial school meets the secular educational requirements of the state, parents and guardians who send children to such parochial school satisfy the "compulsory education" mandate of the state.

The primary purpose of the instant statute is to insure the safety and the well-being of children, whose parents and guardians are compelled by law to send them to school, while such children are being transported to and from such school, whether the school be public or parochial. The statute constitutes an exercise of the police power of the Commonwealth; its emphasis is upon the welfare and safety of children while they are being transported to and from school and not upon the nature of the school to or from which they are being transported. Its aim is secular, not religious.

The framers of our Constitution contemplated that the church and the state be kept separate and apart and that the state maintain a status of impartiality and neutrality toward all religions and religious beliefs. The instant legislation "neither advances not inhibits religion" in the constitutional sense (See: *School District of Abington Township, Pa. v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560 (1963), but simply provides a method of safe transportation for children while performing the state-compelled duty of attending school.

In my view, neither the U. S. Constitution nor the Constitution of this Commonwealth prohibits or proscribes this statute so vital to the well-being of children pursuing their education.

DISSENTING OPINION

BELL, C. J. FILED: January 17, 1967

Is the Act of June 15, 1965,[1] which amends Article III, Section *1361,* of the Act of March 10, 1949,[2] known as the "Public School Code of 1959," Constitutional *under both the Constitution of the United States and the Constitution of Pennsylvania?* Each of the present actions sought to prohibit the defendant school district's expenditure of public funds for the purpose of furnishing free transportation to pupils attending Catholic and other *nonprofit sectarian schools,* as authorized by the aforesaid amending Act of 1965.

Prior to the aforesaid 1965 amendment to the Public School Code, Section 1361 of the Public School Code provided only that "the Board of School Directors in any school district *may,* out of the funds of the district, *provide for the free transportation of any resident pupil to and from the public schools*[3] . . ."

The Act of 1965 pertinently provides:

"The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:
"Section 1.

"Section 1361, act of March 10, 1949 (P.L. 30), known as the 'Public School Code of 1949,' is amended to read:

"Section 1361. When provided . . .

1—Act No. 91, P.L. ....., 24 P.S. §13-1361..

2—P.L. 30, 24 P.S. §13-1361.

3—Italics throughout, ours, except where underlinings appear in a statute.

"The board of school directors in any school district may, out of the funds of the district, provide for the free transportation[4] of any resident pupil to and from the public schools and to and from any points in the Commonwealth *in order to provide tours* for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation[5] of pupils who regularly attend nonpublic elementary and high schools not operated for profit. Such transportation provided for pupils attending nonpublic elementary and high schools not operated for profit *shall be over established public school bus routes. Such pupils shall be transported to and from the point or points on such routes nearest or most convenient to the school which such pupils attend . . .*"

In the Amendatory Act of 1965 the Legislature in the clearest language *directed* boards of school directors (in any school districts in this Commonwealth) to use (under certain circumstances) *public funds* for the free transportation of pupils who regularly attend *non-public* elementary and

4—by school conveyances, private conveyances or electric railways or other common carriers. Section 1362.

5—See also, "Section 2. The amendments made by this act shall not be so construed as to limit or reduce in any way the payments now made by the Commonwealth to various school districts to help defray the cost of transporting pupils and the additional costs incurred by the board of school directors in furnishing transportation under said amendments shall be included in the amounts for which reimbursement may be received from the Commonwealth as now provided by law."

high *schools which are not operated for profit*[6] whenever provision is made by such a board for the transportation of resident pupils to and from the public schools.

The essential averments in the complaints before us are that pursuant to the Amending Act, a school district has agreed to supply, or has appropriated tax money for the purpose of supplying, free transportation to pupils attending *nonprofit schools outside the public school system.* In the Worrell (Delaware County) action it is averred that such transportation will be supplied to pupils attending "sectarian" schools. In the Rhoads (Montgomery County) case, plaintiffs particularize. They aver that in the Abington Township School District there are five nonprofit schools owned and operated by the Roman Catholic Church, that these schools are *sectarian* and are parts of an independent school system maintained by such Church for the teaching and propagation of its particular faith, and that the furnishing of transportation to parochial school children is a necessary function in the operation of such schools.

Plaintiffs contend that the furnishing of free transportation by school districts to children attending sectarian schools constitutes a use of public funds to or is clearly for the benefit of sectarian schools and therefore violates (1) the First Amendment to the Federal Constitution and also (2) (a) Article I, Section 3, and (b) Article III, Section 18, and (c) Article X, Section 2, of the Constitution of Pennsylvania. They further contend that the *alleged* purpose of the Act,

6—with provisions and limitations not here pertinent.

viz., protection of the health, safety and welfare[7] of children attending sectarian and nonprivate schools, *is unjustly discriminatory and is merely a sham and a subterfuge for financial aid to sectarian schools.* For example, *so far as health and safety* are concerned, (1) young children attending private schools are unprovided for, and (2) young children attending public schools and sectarian schools (a) who do not live near an established bus route or (b) who live within a mile and a half of the public or sectarian school they attend, are unprovided for, and (3) young children who have

7—The Pennsylvania Secretary of Public Welfare, Mr. Arlin M. Adams, testifying at the public hearings before the Senate Education Committee, said: ". . . *school bus* transportation clearly involves the *safety* and *health* of our children. The busing of school children is for their protection against hazards of the roadways and of traffic, against dangers occasioned by exposure to weather, against evils of child molestation. In 1963, there were 2.3 deaths per 100,000,000 miles, in cars, as compared with .2 death, per 100,000,000 miles, in school buses. With respect to injuries, a person is five times as safe in a school bus as in a car. With respect to death, a person is ten times as safe in a school bus as in a car." However, strange to say, *the Act did not require transportation by a bus,* although all the parties in their briefs discuss the issues on the basis that the transportation will be by bussing. Moreover, neither Mr. Adams' testimony upon which the majority Opinion relies, nor the State of the Commonwealth Message delivered by the Governor of Pennsylvania (William W. Scranton) to the General Assembly, January 5, 1965, which recommended legislation to provide free bus transportation for children attending public and non-public schools in order to protect the health and safety of such children, upon which the Commonwealth and other parties rely, is admissible. *Bowers v. Pennsylvania Labor Relations Board,* 402 Pa. 542, 557-558, 167 A. 2d 480; *Henderson Estate,* 395 Pa. 215, 224, 149 A. 2d 892; *National Transit Co. v. Boardman,* 328 Pa. 450, 454, 197 Atl. 239.

to cross hazardous city streets near their school in a large city are unprotected and unprovided for.

The principal defense raised by the school districts and also by the Commonwealth is that the "sole purpose and effect" of the 1965 Amendatory Act is to promote the safety, health and welfare of children attending nonpublic, nonprofit schools in the same manner as the safety, health and welfare of children presently attending public schools are promoted, *and a similar protection for children attending private schools is unnecessary and irrelevant.*

The Commonwealth further contends that the fact that the Act is *part of the Public School Code* is of no significance, and the public policy of the Commonwealth has utilized the Public School Code and funds of the school districts as the particular instrument and means for carrying on a wide variety of welfare, health and safety activities some of which have no realistic connection to the support of public schools.

Nearly all of the important facts and factors are agreed upon; the parties differ widely and vigorously upon (1) inferences and conclusions deduced or drawn from the facts, and (2) the correct meaning and interpretation of the pertinent provisions of the Federal and State Constitutions, and (3) the decisions of the Supreme Court of the United States.

Does the Act violate the Federal Constitution?

We start with the fundamental proposition that every Act is presumed to be both valid and Constitutional. *United States v. National Dairy Corporation,* 372 U.S. 29, 32; *Madden v. Kentucky,* 309 U.S. 83, 88; *Highland v. Russell Car and Snow Plow Co.,* 279 U.S. 253, 262; *Home Telephone Co. v. Los Angeles,* 211 U.S. 265, 281; *Sweet v. Rechel,* 159 U.S. 380. Cf. also *Goldblatt v. Hempstead,* 369 U.S. 590, 595-

596; *United States v. Carolene Products Co.*, 304 U.S. 144, 152-154.

The First Amendment to the Constitution of the United States pertinently provides:

"Congress shall make *no law respecting an establishment of religion*, or prohibiting the free exercise thereof; . . ."

Although this clause in the First Amendment clearly constitutes a "religious" restraint *only on Congress*, recent decisions of the Supreme Court hold that the Fourteenth Amendment has made the First Amendment a restraint upon the States as well as upon Congress. *School District of Abington Township v. Schempp*, 374 U.S. 203, and cases cited therein; *Murdock v. Pennsylvania*, 319 U.S. 105, 108; *Everson v. Board of Education*, 330 U.S. 1; *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 210-211; *Zorach v. Clauson*, 343 U.S. 306; *McGowan v. Maryland*, 366 U.S. 420; *Torcaso v. Watkins*, 367 U.S. 488; and *Engel v. Vitale*, 370 U.S. 421.

The short 15-word "Establishment" and "Free Exercise" clause of the First Amendment has generated many different and widely divergent views. To state the law in broad terms and generalities is easy, to particularize and to apply it is often difficult. Because of the great change in the life and habits and thoughts of the American people, and indeed of *education itself*, from the days of our "Framing Fathers," and because the questions and issues are often very close and overlapping or conflicting and at times filled with emotion, the net result has been the drawing of a line which

is often thin and shadowy or elusive[8] between the Constitutionally permissible and the Constitutionally impermissible.

So far as the "Establishment Clause" is concerned, I believe the present cases are ruled by the leading case of *Everson v. Board of Education*, 330 U.S.,[9] supra, where the facts and issues are strikingly similar. A New Jersey statute authorized district boards of education to make contracts for the transportation of children to and from schools other than private schools operated for profit. A board of education by *resolution authorized the reimbursement of parents for fares paid for the transportation by public carrier of children* attending public *and Catholic schools*. The Catholic schools operated under the superintendency of a Catholic priest and, in addition to secular education, gave religious instruction in the Catholic Faith. A district taxpayer challenged the validity under the Federal Constitution of the statute and resolu-

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8—Mr. Justice BRENNAN, in a concurring Opinion, in *Abington School District v. Schempp*, 374 U.S., supra, said (pages 230, 231, 245): "The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate [or more filled with emotion] or more demanding than that of the relationship between religion and the public schools . . . The fact is that the line which separates the secular from the sectarian in American life is *elusive*. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. . . . The case [U.S. v. Ballard, 322 U.S. 78, 95] shows *how elusive is the line* which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion . . ."

9—Mr. Justice RUTLEDGE filed a lengthy dissenting Opinion in which three other Justices joined. Furthermore, Mr. Justice DOUGLAS expressly stated in *Engel v. Vitale*, 370 U.S. 421, that after further thoughtful consideration he believed he and the rest of the majority in *Everson* were mistaken in their Opinion in that case.

tion, so far as they authorized reimbursement to parents for the transportation of children attending sectarian schools. Without deciding whether the exclusion of reimbursement to parents of children attending private schools operated for profit constituted a denial of the equal protection of the law, the Supreme Court sustained the Constitutionality of the Act and held:

1. The expenditure of tax-raised funds thus authorized was for a public purpose, and did not violate the due process clause of the Fourteenth Amendment; and

2. The statute and resolution did not violate the provision of the First Amendment which was made applicable to the states by the Fourteenth Amendment, prohibiting any "law respecting an establishment of religion."[10]

The Court, in *Everson v. Board of Education*, 330 U.S., pertinently said (pages 14, 16, 17):

"Their decisions, [the decisions of the State Courts] however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

". . . New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other

10—The Court reviewed (a) the evils, the struggles and persecutions which had been going on abroad for centuries and from time to time in the Colonies between various religions, and religious faiths; and (b) the belief and reliance of our Colonists in God; and (c) the historical debates which induced the adoption of the First Amendment.

hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation . . .

"Measured by these standards, we cannot say that the *First Amendment* prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public *and other schools.*"

Plaintiffs present plausible arguments to support their contentions of unconstitutionality and argue, inter alia, (1) that *Everson*, 330 U.S., supra, is no longer the law because three of the five majority Justices in that case have died and another one has changed his views,[11] and (2) subsequent decisions of the Supreme Court have abandoned or changed some of the reasoning or statements upon which the majority relied in that case. See and compare, *Abington School Dist. v. Schempp*, 374 U.S. supra; *McGowan v. Maryland*, 366 U.S. 420; *Engel v. Vitale*, 370 U.S. 421, 442; *Sherbert v. Verner*, 374 U.S. 398, 410.

In order to determine the contentions and the issues raised by the parties, we shall briefly analyze and review the subsequent cases which have been relied upon by one or more of the parties.

11—I agree with the Court's decision, but it is this writer's opinion, which the dissenting Justices of the Supreme Court clearly emphasize in *Everson v. Board of Education*, 330 U.S., supra, that some of the analogies employed by the majority of the Supreme Court to support its opinion are neither relevant nor convincing.

The Supreme Court in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, struck down as *violative* of the First Amendment the teaching of religion in public school buildings by outside teachers supplied by various denominations under a "released time for children" arrangement between them and the Board of Education. Under this arrangement, the Board released the public school children for limited periods and allowed the use of its school buildings for the teaching of various denominational beliefs by *outside* religious teachers.

On the other hand the Supreme Court in *Zorach v. Clauson*, 343 U.S. 306, *held Constitutional* a "released time" program for the religious education of public school children *off the premises of such schools*, in which for brief periods the schools released children whose parents desired them to receive denominational education in their own Churches and Sunday Schools.

In *Engel et al. v. Vitale, et al.*, 370 U.S. 421, 422, the Supreme Court declared *Un*constitutional a directive by the Board of Education to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day, *although no student was compelled to attend or to join in* the prayer over his or his parent's objection:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

This decision to me is incomprehensible. Cf. also, *Illinois ex rel. McCollum v. Board of Education*, 333 U.S., supra.

On the other hand, *Everson v. Board of Education* has been followed and affirmed in *McGowan v. Maryland*, 366

U.S., supra, and in *Abington School District v. Schempp*, 374 U.S., supra. In *McGowan v. Maryland*, supra, where a divided Court in Opinions covering 162 pages analyzed and reviewed prior decisions and after quoting with approval (on pages 443-444) *Everson v. Board of Education*, held *Constitutional* a Maryland law which *generally* prohibited the sale on Sunday of all merchandise, although it contained many specific exceptions and limited the act to retailers in one county. The Court held, inter alia, that the purpose and effect of the statute was for the public welfare, i.e., not to aid religion, but to set aside a day of rest and recreation[12] for the public at large.

In *Abington School District v. Schempp*, 374 U.S. supra, the Court said (pages 205-222):

"Once again we are called upon to consider *the scope* of the provision of the First Amendment to the United States Constitution which declares that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .' The companion cases present the issues in the context of state action requiring that *schools begin each day with readings from the Bible.* While raising the basic questions under slightly different factual situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are *unconstitutional* under the *Establishment Clause, as applied to the states through the Fourteenth Amendment.*

12—The Court on page 437 referred to the long and intensive struggle for religious freedom in America as set forth in the Opinions in *Everson v. Board of Education*, 330 U.S., supra, and the historical position of Sunday closing laws as set forth in the same case.

". . . The Commonwealth of Pennsylvania by law . . . requires that 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be *excused* from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.'

". . . Participation in the opening exercises, as directed by the statute is *voluntary*. . . .

"It is true that religion has been closely identified with our history and government. As we said in Engel v. Vitale, 370 U.S. 421, 434 (1962), 'The history of man is inseparable from the history of religion. . . .' The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, 'So help me God.' Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.[13] Again, there are such

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13—We may add that every daily session of the State Supreme Court and of every State Court in Pennsylvania is opened with a very brief ceremony which ends with the words "God save the Commonwealth and this Honorable Court." President Washington, President Lincoln, President Cleveland, President Wilson, President Roosevelt, President Eisenhower, President Kennedy, and nearly every President of the United States, have invoked in one or many of their speeches the aid of God. One of the lines of the Star-Spangled Banner is, "Then conquer we must when our cause it is just, and this be our motto 'In God Is Our Trust'." Since

manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership, Bureau of Census, U.S. Department of Commerce, Statistical Abstract of the United States, 48 (83d ed. 1962), while less than 3% profess no religion whatever. Id., at p. 46. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his . . . blessing. . . .' . . .[14]

"This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with memberships exceeding 50,000, existing among our people, as well as innumerable smaller groups . . .

". . . [and then, most importantly, the Court said]

". . . The test may be stated as follows: *what are the purpose and the primary effect of the enactment? If either* is the advancement or inhibition of religion then the enact-

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1865, the words "In God we Trust" have been impressed on our coins and imprinted on our paper money. The Pledge of Allegiance to the Flag contains the words "One Nation under God, indivisible, with liberty and justice for all."

14—Notwithstanding these and even stronger religious sentiments expressed by the majority in the *Everson* case, I believe—as do the dissenting justices in that case—that what the Supreme Court avows about our religious beliefs and liberties, its conclusions and decisions too often disavow.

ment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion.* Everson v. Board of Education, supra; McGowan v. Maryland, supra, at page 442."

To summarize: notwithstanding the difficulty of reconciling all of the aforesaid cases, I believe that *Everson v. Board of Education,* 33 U.S. supra, and *Abington School District v. Schempp,* 374 U.S., supra, are still the law and require us to hold that the Amendatory Act of 1965 does not violate the First or Fourteenth Amendment of the Constitution of the United States.

Does the Amendatory Act of 1965 violate the Constitution of Pennsylvania?

Plaintiffs contend that the 1965 Amendatory Act violates Article I, Section 3, and Article III, Section 7 and Section 18, and Article X, Section 2, of the Constitution of Pennsylvania.

The principle is well settled in Pennsylvania that an Act will be declared unconstitutional only if it "clearly, palpably and plainly" violates the Constitution: *Milk Control Commission v. Battista,* 413 Pa. 652, 659, 198 A. 2d 840; *Daly v. Hemphill,* 411 Pa. 263, 271, 191 A. 2d 835; *Dauphin Deposit Trust Co. v. Myers,* 388 Pa. 444, 450, 130 A. 2d 686, and *Evans v. W. Norriton Twp. Mun. Auth.,* 370 Pa. 150, 158, 87 A. 2d 474.

For many years, *Collins v. Kephart,* 271 Pa. 428, 117 Atl. 440, was considered the leading case in this field. In *Collins v. Kephart,* a bill in equity for an injunction was brought in five separate taxpayers' suits. The Court declared *Unconstitutional* an appropriation to the Passavant Hospital of

Pittsburgh and to St. Timothy's Memorial Hospital and to the Duquesne University of the Holy Ghost and to the Dubois Hospital Association and to the Jewish Hospital Association of Philadelphia. Each of these hospitals was a very worthy charity. Each contended that it was not a denominational or sectarian institution. Each of the hospitals admitted persons without regard to their religious faith and had non-sectarian directors and boards composed of various denominations to conduct the hospitals and to take part in its management, and each proclaimed that it was not a sectarian or denominational institution. The Court held (a) that Article III, Section 18,[15] forbids State aid to all institutions affiliated with a particular religious sect or denomination, or which are under the control, domination or governing influence of any religious sect or denomination, and therefore, (b) the appropriations, even though they had been made without question or complaint for a period of 40 years, were *Un*constitutional. Chief Justice Moschzisker, speaking for a unanimous Court said (pages 434-435): ". . . long persistence in a breach of the Constitution neither warrants the course pursued nor gives it legality: Kucker v. Sunlight, etc., Oil Co., 230 Pa. 528, 533.

"It is quite apparent that the creation of the so-called local board represents simply an effort to make the Passavant Hospital appear as though it were not a denominational institution, and thus enable it to obtain state aid; but that which cannot be done directly the law will not permit to be accomplished by indirection, for such a course, when tolerated by the courts, only serves to bring the law into contempt. The appropriation under attack, having in fact been made to

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15—Quoted hereinafter.

a sectarian and denominational institution, cannot stand in law. (Pages 436-437)

". . . While all persons, without distinction of race, color or religion, are admitted to defendant hospital, yet there can be no doubt that it is a sectarian institution within the meaning of that term as used in the Constitution; therefore the appropriation to it fails in law. (Page 437)

". . .

"*We cannot but see that the arrangement before us is nothing more nor less than a plan to evade the Constitution.* No doubt the plan was honestly conceived, in the belief that it was permissible and would prove effective; but this makes it none the less a *legal subterfuge.* The pruning knife of the law *eliminates all such devices, and lays bare the realities of the situation,* with which we must deal; these show the hospital named in the appropriation act to be under the control of a well known, much respected, religious order, and the state's money cannot be permitted to go through the agency of the hospital association to this sectarian institution, since it falls within the class to which that character of recognition is forbidden by the Constitution. (Pages 439-440)

". . .

". . . Those who adopted the restriction against appropriating money to sectarian institutions must change the rule, if desired, either through an amendment to the present Constitution or by making a new one; neither the legislature, acting alone, nor the courts have power so to do." (Page 441)

"The history of the development of social and political life in America shows a set purpose to divorce, absolutely, church and state: and this is the real underlying explanation of provisions like the one now before us, which appear, in

one form or another, in the constitutions of many American commonwealths. *The intent* of these provisions was, and therefore still is, *to forbid the state from giving, either directly or indirectly,* any recognition to a religious sect or denomination, *even in the fields of public charity and education;* they in effect provide that, to serve charitable, educational or benevolent purposes, the money of the people shall not be put under denominational control or into sectarian hands, for administration or distribution, *no matter how worthy the end in view.* (Page 432).

In other words, the Court held that the language, meaning and intent of this provision of the Constitution was clear and plain, *and no worthy objective would be allowed to circumvent or distort it or to give taxpayers' money directly or indirectly by evasion or circumvention or subterfuge to or for the benefit of a sectarian church, hospital or charitable institution, body, group, sect or denomination, even for very benevolent or important educational purposes.*

Collins v. Kephart has been cited several times with approval, and has never been overruled or distinguished.

In *Constitutional Defense League v. Waters, et al.,* 308 Pa. 150, 162 Atl. 216, which arose by a taxpayer's bill in equity seeking injunctive relief, this Court in a unanimous Opinion held that a charitable appropriation by the Legislature to a sectarian hospital was *Un*constitutional because it violated Article III, Section 18, of the Constitution of Pennsylvania. The Court quoted with approval excerpts from *Collins v. Kephart, et al.,* 271 Pa., supra. The case is well summarized in the following paragraph of the syllabus:

"Article III, section 18, of our state Constitution, forbids state aid to institutions affiliated with a particular religious sect or denomination, or which are under the control,

domination or governing influence of any religious sect or denomination."

In spite of the *Collins* and *Constitutional Defense League v. Waters cases*, supra, and *Snyder v. Newtown*, 147 Conn. 374, 161 A. 2d 770,* the Commonwealth contends that the recent case of *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A. 2d 911, sustains the constitutionality of the Amendatory Act of 1965. *Schade* is clearly distinguishable on its facts. *That case correctly decided* that payments by an institution district, or by any State Agency for the support, care and maintenance of delinquent, neglected or dependent children placed by the Juvenile Court in sectarian or denominational homes and institutions do not violate Article III, Section 18, of the Pennsylvania Constitution nor the due process clause of the Fourteenth Amendment. The Court pertinently said (pages 510-512):

The Court pertinently said (pages 510-512):

"It was the plaintiffs' contention below, which the appellant renews here, that the payments made by the Institution District to the named denominational and sectarian

* —In the *Snyder* case, the highest Court in Connecticut held that a statute which authorized the town to transport at public expense children to non-profit private schools did not violate the Federal or the State Constitutional provisions respecting establishment of religion, but that insofar as it purported to make available for the transportation of pupils attending non-profit private schools money derived from school funds, it was *unconstitutional* under the State Constitution, in that money had been inviolably appropriated to the support and encouragement of public or common schools. On appeal to the Supreme Court of the United States, the Court handed down the following Opinion "Per Curiam": "The motion to dismiss is granted and the appeal is dismissed for want of a substantial Federal question."

institutions for the board, care and maintenance of dependent and neglected children committed thereto by the Juvenile Court of Allegheny County violated Article III, Section 18 of the Pennsylvania Constitution which provides that 'No appropriations shall be made for charitable, educational or benevolent purposes *to any person* or community *nor to any denominational and sectarian institution, corporation or association.*' The appellant also contends that such payments violate the due process clause of the *Fourteenth Amendment* of the Federal Constitution by effecting a deprivation of the liberty guaranteed by the First Amendment through the prohibition respecting 'an establishment of religion.' This question was not raised in the court below and got into the case solely by being dealt with by the dissenting chancellor upon the entry of the final decree by the court en banc.

"The opinion for the court [below] is based principally on the conclusion that the inhibition of Article III, Section 18 of the Constitution is directed solely against appropriations of State funds by the legislature and *does not apply to a governmental agency such as an Institution District. With that, we are unable to agree.* . . . It would be strange, indeed, if the legislature by creating a body politic or corporate to exercise a legislative function could do indirectly what it may not do directly. It seems too plain for cavil that, if a mere creature of the legislature can do what the legislature itself is constitutionally prohibited from doing, the carefully designed prohibition of Section 18 of Article III could readily be rendered useless. Such a result is not to be sanctioned: Collins v. Kephart, 271 Pa. 428, 439, 117 A. 440.

"We, therefore, choose to bottom our decision on the ground that payments made by the Institution District for

the support and maintenance of neglected or dependent children, who are under the jurisdiction and control of the Juvenile Court, *are not appropriations*[16] within the meaning of that term as employed in Section 18 of Article III. . . .

" 'The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but *a governmental duty* [irrespective of the religion of a neglected child]. All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors[17] . . . A considerable part of this money is recouped by the Juvenile Court from the parents of these minor wards. The balance of the funds so expended are, *in legal effect*, payments to the child,—not the institution supporting and maintaining him or her. [See Cochran v. Board of Education, 281 U.S. 370, 374-375][18] . . ."

The Court then added by way of dictum (page 512-513):

"The appellant's further contention that such payments by the Institution District are in violation of the due process clause of the Fourteenth Amendment is equally un-

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16—It must be remembered that appropriations can be made only from revenue obtained from taxes or borrowing.

17—Moreover, it is a matter of common knowledge that places for the commitment of neglected children are both insufficient in number and in many ways inadequate.

18—In *Cochran*, the Court held that an appropriation by the State of money derived from taxation to the supplying of school books free for school children is not objectionable under the Fourteenth Amendment as a taking of private property for private purposes where the books furnished for private schools are not granted to the schools themselves but only to or for the use of the children, and are the same as those furnished for public schools *and private schools* alike, and are not religious or sectarian in character.

meritorious. Inasmuch as this point was not raised in the court below nor there passed upon by the majority, we are not required to consider it here: Sherwood v. Elgart, 383 Pa. 110, 115, 117 A. 2d 899. We shall, however, point out the fallacy of the appellant's argument.

"As it has been held that the concept of liberty, as used in the due process clause of the Fourteenth Amendment, secures to the individual as against state action the same rights as are guaranteed against congressional action by the First Amendment (Cantwell v. Connecticut, 310 U.S. 296, 303; Murdock v. Pennsylvania, 319 U.S. 105, 108; Everson v. Board of Education, 330 U.S. 1, 15; and McCollum v. Board of Education, 333 U.S. 203, 211), the appellant argues that the Institution District's payments to the denominational or sectarian defendants *tend toward governmental 'establishment of religion'* and, consequently, are violative of the Fourteenth Amendment. . . . The Supreme Court has, in principle, settled it adversely to the appellants position. See Everson v. Board of Education, supra, where it was held that a *State's use of public tax funds* for the transportation of pupils *to and from sectarian schools did not serve to promote the establishment* of religion."

We approve the decision in *Schade*, but not that part of its language which conflicts with and is irreconcilable with the Courts decision in *Collins v. Kephart*, 271 Pa., supra, which it cites with approval.

Furthermore, we must consider not only Article III, Section 81, but also Article III, Section 7, and Article X, Sections 1 and 2, of our Constitution, which were not involved or discussed in the Schade case. All of these Articles must be considered together in discussing and determining the issues in this case, i.e., whether the Amendatory Act of 1965, which

amends the Public School Code, violates these or any other provisions of the Constitution of Pennsylvania.

Article III, Section 7, of the Constitution of Pennsylvania prohibits the General Assembly from passing any local or special law "regulating the affairs . . . of school districts, [*or*] *granting to any . . . individual any special or exclusive privilege . . .*"

Article X, Section 1, provides: "The General Assembly shall provide for *the maintenance and support* of a thorough and efficient system *of public schools*, wherein all the children of this Commonwealth above the age of six years may be educated, . . ."

Article X, Section 2, provides as follows:

"Education. Public Schools Provided for . . .

"*Sectarian Schools Not to Receive Public School Money.*

"Section 2. *No money raised for the support of the Commonwealth shall be* appropriated to or *used for the support of any sectarian school.*"

It will be instantly observed that the language of the Pennsylvania Constitution differs greatly from the pertinent language of the First Amendment of the Constitution of the United States, which pertinently merely prohibits "any law respecting an establishment of religion." The Constitution of Pennsylvania clearly and expressly mandates a public school system for Pennsylvania school children, and (a) clearly and expressly prohibits appropriations to or *use of public money for the support of any sectarian school* and (b)

in Article III, Section 18, provides: "No appropriation shall be made for charitable, *educational or benevolent purposes to any person* or community nor to any denominational or sectarian institution . . ."[19] Considering all the aforesaid Articles together, as of course we should, it is crystal clear that no money raised by the Commonwealth or by any of its agencies or by any governmental institution can be used for the support of any sectarian school, or used to grant any special privilege to the children who attend it, no matter how worthy and benevolent that sectarian school or institution is, and no matter how beneficial these grants to the children or their parents would be.

The raising of money by taxes or by borrowing or the expenditure of public funds to provide transportation *not for all* school children in Pennsylvania *but only for children who attend public or sectarian schools* which are not operated for profit, clearly violates the spirit, the meaning and the intent of the aforesaid provisions of the Pennsylvania Constitution, and, we believe, the language thereof. These Constitutional provisions are of such tremendous importance to *all* the people of Pennsylvania that no circumvention, dilution or distortion should be allowed to evade or nullify or make a mockery of them. The 1965 Amendatory Act undoubtedly benefits healthwise and safetywise a *restricted class* of school children, as well as sectarian schools. If it is both reasonable and necessary to protect the safety and health of public school children and sectarian school children by the State's use of public or institutional tax funds for their transportation to school, how can it be reasonable and legal and Constitutional, and not arbitrary and discrimina-

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19—With certain provisions, grants and exceptions not here pertinent.

tory, to exclude private school children from the benefits of these health and safety measures?[20]

The title of the 1965 Act states that its purpose is to "provide for the health, welfare and safety of the children of the Commonwealth", and yet in the very same breath excludes those children who attend schools which are operated for profit. The fact that the so-called School Bussing law or its 1965 amendment does not provide for the transportation of *all* school children, regardless of the kind of school they attend, demonstrates that the *real "purpose and the primary effect"* of the Act of 1965 was to benefit and protect the health and safety of only sectarian school children (as well as, indirectly, their schools), *rather than to provide for and protect the health and safety of all the school children of Pennsylvania.*

To express it in other words, if this *1965 Act* is, as its proponents contend, really for the protection of the health and safety—*not of all* school children but only—of *sectarian* school children, by providing public funds for the protection of the health and safety of *this special class* of school children, i.e., parochial or sectarian school children, then it is

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20—We further note that under Section 1362 of the Public School Code, free transportation of resident pupils of public and sectarian schools may be provided out of the funds of the school district, but such transportation (1) shall be over established public school bus routes and not nearer a school than a mile and a half, and (2) may be furnished by using either school conveyances, private conveyances, or electric railways or other common carriers. What happens or may happen to the safety and health of all those school children (1) (a) who live far from an established bus route station, or (b) within a mile and a half of the public or sectarian school they attend; and (2) those children who attend a private school?

unreasonable, arbitrary and invidiously discriminatory, and such an obviously patent device to circumvent and nullify the Constitution as to be clearly and beyond any doubt Unconstitutional.

Legislative Classifications

We may add that there is another barrier which the majority does not even discuss. Legislative classifications are permitted in Pennsylvania and are Constitutional, provided they are not unreasonable and arbitrary and have a reasonable basis for the distinctions and classifications they make. We all agree that the wisdom or lack of wisdom of an Act is a matter for the Legislature and not for the Courts, and that classifications and distinctions will be sustained provided they are "reasonable and founded upon a genuine distinction."

The law is well expressed in *Kurtz v. Pittsburgh, et al.*, 346 Pa. 362, 31 A. 2d 257, where the Court held *un*constitutional, as being in plain controvention of Article III, Section 7, the Act of June 7, 1917, as amended. That Act provided for the payment to dependent wives of public employees in the armed forces of the United States of a specified portion of their salary. In a lengthy 24-page Opinion, the Court analyzed and reviewed many of the cases involving the question of a violation of Article III, Section 7, of the Pennsylvania Constitution,[21] and pertinently said (Pp. 367, 368, 369):

21—For a more recent analysis and review of many decisions of this Court and of the Supreme Court of the United States, see the dissenting Opinion in Bargain City U.S.A. v. Dilworth, 407 Pa. 135-142.

"Class legislation has frequently been declared void by this Court, and what *is*[22] class legislation has been defined and illustrated in a long line of decisions. In Penna. Co. for Insurances on Lives and Granting Annuities et al., Appellants, v. Scott, Prothonotary, et al., 329 Pa. 534, 198 A. 115, this Court in an Opinion by Mr. Justice LINN quoted what was said in Laplacca et ux v. Phila. Rapid Transit Co., 265 Pa. 304, 108 A. 612, as follows: '*The basis for classification must be reasonable and proper and founded upon a real, and not merely artificial, distinction* between the members of the class and the general public, and based upon "a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, *and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others*".'

". . . In Ayars' Appeal, 122 Pa. 266, 16 A. 356, Justice STERRETT said: 'The underlying principle of all the cases is that classification . . . is essentially unconstitutional, unless a necessity therefor exists [a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes and imperatively demanding legislation for each class separately, that would be useless and detrimental to the others] . . .' This principle was applied in Commonwealth ex rel. Brown v. Gumbert et al, 256 Pa. 531 [534], 100 A. 990. Although the legislation under attack there was 'humanitarian', we said that a 'positive constitutional requirement' cannot be disregarded because of an act's 'beneficent aim.'

". . . arbitrary selection can never be justified by calling it classification . . ."

22—Italics in *Kurtz* Opinion.

See also *Davis, et al. v. Sulcowe,* 81 Dauphin 72 (1963), wherein it was held that there was no basis for distinguishing between nonprofit nursing homes and proprietary nursing homes for minimum wage requirement purposes.

Because the 1965 Amendatory Act has such an important and beneficial purpose and objective, it is with great regret that I feel I must dissent and hold that the Amendatory Act of 1965, with its arbitrary and unreasonable distinctions and classifications—which do not imperatively demand safety and health protection for sectarian school children *which would be useless and detrimental to private school children*—is clearly and plainly unconstitutional.

DISSENTING OPINION

COHEN, *J.* FILED: January 17, 1967

The act in question violates, in my opinion, both the Pennsylvania Constitution and the Federal Constitution, and is further void for vagueness and incompleteness. Moreover, it is premised upon the subterfuge of the "child benefit" theory, and the present case comes before us with a record insufficient to substantiate the arguments made in support of the statute.

Article 10, sections 1 and 2 of the Pennsylvania Constitution provide:

> "§1. Public school system
> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.
> "§2. Diversion of school moneys to sectarian schools
> "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

Section 1 is a mandate to the legislature to maintain and support a system of public schools. Section 2 is a prohibition against the diversion of public school tax moneys to or for the support of sectarian schools. As I view the matter, in a society which tends to increase the size of schools and to erect them ever further from the homes of the students, the

provision of transportation to and from school has become an integral function of the educational system and is a direct aid thereto. Accordingly, where the school system is sectarian, the provision of tax supported transportation for the purpose of affording a daily pilgrimage to a place offering religious training is an appropriation to a sectarian institution in violation of Article 10, section 2 of the Constitution of this Commonwealth.

Regarding the First Amendment arguments, I recognize the apparent binding effect of *Everson v. Board of Education*, 330 U.S. 1 (1947). However, I believe that certain more recent statements of the Supreme Court have to a great extent diminished the force and impact formerly enjoyed by Everson. In *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203 (1947), the Court held that a "released time" arrangement whereby pupils were permitted to receive religious instruction in public school buildings during regular school hours was in violation of the First Amendment principle of separation of church and state; in *Torasco v. Watkins*, 367 U.S. 488 (1961), the Court held that the requirement of the Maryland Constitution that every office holder must declare a belief in the existence of God violated the First Amendment as an invasion of the individual's freedom of belief and religion; in *Engel v. Vitale*, 370 U.S. 421 (1962), the Court held that the use of the public school system to encourage recitation of a brief non-denominational prayer was inconsistent with the establishment clause; and in *Abington School District v. Schempp*, 374 U.S. 203 (1963), the Court held that school exercises requiring the reading of Bible verses or the Lord's Prayer violated the establishment clause. Especially significant is the fact that one of the critics of *Everson* is Justice Douglas, who was among the five majority

justices in *Everson* but who in *Engel* stated in a concurring opinion that as he reconsidered the decision in *Everson*, it was inconsistent with the First Amendment and that the dissenting opinion of Justice Rutledge in *Everson* was better law. I should like the United States Supreme Court finally to decide this case so that they may reconsider the *Everson* doctrine. Accordingly, I would appoint a master in each case with instructions that a record be made upon which both this Court and the United States Supreme Court might more meaningfully reach a decision.

The act in question is further void inasmuch as it is vague and incomplete. The statute authorizes busing "over established public school bus routes" and requires nonpublic school pupils to be transported to and from "the point or points on such routes nearest or most convenient to the [nonpublic] school which such pupils attend." The Attorney General, apparently realizing that as enacted the statute remained too vague to be implemented, outlined in a letter to the Acting Superintendent of Public Instruction several guidelines for the implementation of the act. In it the Attorney General declared that a school board may make deviations from established routes, may make *new* routes and *re-routes*, and may reestablish routes in order to accommodate nonpublic school children. In addition, he defined as part of the established public school bus route any distance which a school bus is required to travel beyond a public school in order to complete its trip or reach its place of storage. In effect, the Attorney General assumed the role of an overseer of the legislature and rather than *interpret* the act, saw fit to write his own version simply because the statute passed by the General Assembly was incomplete and unworkable. Neither the Attorney General nor the Courts may

write legislation for the General Assembly, and when that body has failed to include certain essential requirements in an enactment, neither the executive nor the judiciary may under the guise of interpretation add the missing requirements. *Altieri v. Allentown Officers' and Employees Retirement Board*, 368 Pa. 176, 81 A. 2d 884 (1951); *Akins v. York Officers' and Employees' Retirement Board*, 368 Pa. 182, 81 A. 2d 883 (1951); *Note, The Void-for-Vagueness Doctrine*, 109 U. Pa. L. Rev. 67 (1960).

Finally, on the record (or lack of one) before us, I am unable to conclude that this statute may be sustained by virtue of the "child benefit" theory. It is obvious that that theory is merely a subterfuge by which its supporters justify the enactment in question. For one thing, the act does not provide free transportation for all pupils. It excludes from the enjoyment of its benefits students who attend private schools operated for profit. I can see no basis for omission of these children if the statute was truly enacted for the safety and welfare of the children of our Commonwealth. The reason is clear, however, because an examination of the statute indicates that safety was not the predominant motive for its passage. The act, as passed, will actually *increase* the danger to children who formerly were transported from their homes to the private or parochial schools in privately operated buses. The act provides for transportation of such pupils to and from points on established school bus routes "nearest or most convenient to the [nonpublic] school . . ." This statute completely ignores the additional hazards that imperil these children, and cannot be sustained by reference to a makeshift "child welfare" theory. The only way this provision can truly serve the welfare of the children of the Commonwealth is that it be implemented by providing to the

nonpublic school children the same service accorded to those that attend public school. That means taking them to and bringing them from their schools and by so doing, clearly violating the Pennsylvania and Federal Constitution. As I have indicated, bus transportation has become an integral part of the process of education and any improvement in the transportation of pupils must be considered as an aid to the schools. In fact, the statute in question, in addition to the provisions herein considered, provides for free transportation of public school pupils for tours "connected with the educational pursuits of the pupils." The act was passed as an aid to education and that is all. Since it grants tax supported benefits to sectarian educational institutions it is unconstitutional. That is all there is to it.

I dissent.

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA

BETTY J. WORRELL, *Plaintiff*

vs.

GEORGE W. MATTERS, JOHN C. SNYDER, CHARLES H. MEYER, LEWIS M. EVANS, III, KENNETH R. MEENEN, RICHARD L. RAYMOND, JOSEPH H. WALTON, Directors of Rose Tree Union School District and H. JOHN LUMSDEN, Secretary of Rose Tree Union School District and STANLEY C. CAMPBELL, Superintendent of Rose Tree Union School District and CONTINENTAL BANK AND TRUST COMPANY, Treasurer of Rose Tree Union School District,
Defendants

No. 10209
of 1965
IN EQUITY

AMENDED COMPLAINT

1. Plaintiff is an individual residing at 20 Line Road, Upper Providence Township, Delaware County, Pennsylvania. Plaintiff and her husband, G. Richard Worrell, are the owners of premises at 20 Line Road, Upper Providence Township, Delaware County, Pennsylvania and, therefore, plaintiff is a taxpayer in the Rose Tree Union School District.

2. Defendant, GEORGE W. MATTERS, is an individual residing at Castle Rock, Newtown Square, Delaware County, Pennsylvania; defendant, JOHN C. SNYDER, is an individual residing at Darling, Delaware County, Pennsylvania; defendant CHARLES H. MEYER, is an individual residing at 9 Springton Lake Road, Media, Delaware County, Pennsylvania; defendant, LEWIS M. EVANS, III, is an individual residing at Springton Lake Road, Media, Delaware County, Pennsylvania; defendant, KENNETH R. MEENEN, is an individual residing at Forest Lane, R. D. 1, Glen Mills, Delaware County, Pennsylvania; defendant, RICHARD L. RAYMOND, is an individual residing at 124 Ridge Road, Media, Delaware County, Pennsylvania; defendant, JOSEPH H. WALTON, is an individual residing at 462 Old Forge Road, Media, Delaware County, Pennsylvania. All of the above-named defendants are Directors of the Rose Tree Union School District, Delaware County, Pennsylvania. Defendant, H. JOHN LUMSDEN, is an individual residing at Box 188, Lima, Delaware County, Pennsylvania and is the Secretary of the Rose Tree Union School District, Delaware County, Pennsylvania. Defendant, STANLEY C. CAMPBELL, is an individual residing at 5 Well Fleet Drive, Media, Delaware County, Pennsylvania and is the Superintendent of the Rose Tree Union School District, Delaware County, Pennsylvania. Defendant, CONTINENTAL

BANK AND TRUST COMPANY, is a corporation organized under the banking laws of the Commonwealth of Pennsylvania having its principal office at Main and Swede Streets, Norristown, Montgomery County, Pennsylvania and is the Treasurer of the Rose Tree Union School District.

3. The General Assembly of the Commonwealth of Pennsylvania adopted Act No. 91, which was approved June 15, 1965, entitled,

> "An act relating to the public school system, including certain provisions applicable as well to private and parochial schools; amending, revising, consolidating and changing the laws relating thereto," further providing for the health, welfare and safety of the children of the Commonwealth by requiring school districts under certain circumstances to provide free transportation of pupils attending nonpublic elementary and high schools not operated for profit.

Said act provides in part as follows:

> "Section 1. Section 1361, act of March 10, 1949 (P. L. 30), known as the "Public School Code of 1949," is amended to read:
>
> Section 1361. When Provided. — The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the public schools and to and from any points in the Commonwealth in order to provide tours for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools,

the board of school directors shall also make provision for the free transportation of pupils who regularly attend nonpublic elementary and high schools not operated for profit. Such transportation provided for pupils attending nonpublic elementary and high schools not operated for profit shall be over established public school bus routes. Such pupils shall be transported to and from the point or points on such routes nearest or most convenient to the school which such pupils attend. The board of school directors shall provide such transportation whenever so required by any of the provisions of this act or of any other act of Assembly . . ."

4. Pursuant to the aforesaid act, defendant directors of the Rose Tree Union School District on or about June 24, 1965 approved the expenditure of funds to provide for bus transportation for nonpublic school pupils in the Rose Tree Union School District.

5. Plaintiff is advised, believes and therefore avers that the aforesaid defendants have authorized the purchase of additional buses (which purchase is imminent) and the expenditure of other sums for the purpose of providing bus transportation for nonpublic school pupils.

6. Some of the pupils for whom the said defendants proposed to provide free bus transportation attend sectarian schools. Said action and the aforesaid act are null and void because they are contrary to the provisions of Article X, Section 2 of the Constitution of the Commonwealth of Pennsylvania, which provides as follows:

"No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

7. The aforesaid action and act are null and void and violate the provisions of Article I of the Amendments to the Constitution of the United States in that they provide for the support of religious purposes.

8. Section 2 of the aforesaid Act, 91 approved June 15, 1965, is null and void under the provisions of Article III, Section 17 and Article III, Section 18 of the Constitution of the Commonwealth of Pennsylvania which forbid appropriations to charitable or educational institutions not under the absolute control of the Commonwealth and for charitable, educational or benevolent purposes to any person or community . . . denominational or sectarian institution, corporation or association.

9. The aforesaid act is null and void because it is so vague and indefinite that it is incapable of being enforced in that it does not,

(a) define "nonpublic elementary and high schools not operated for profit";

(b) define "established public school bus routes";

(c) provide any limitation on the amount of expenditures;

(d) limit the method of transportation;

(e) define "pupils".

10. The aforesaid act does not limit free transportation to pupils residing in the school district, and neither said act nor any other provision of the "Public School Code of 1949" authorizes the transportation of nonresident pupils (with certain minor exceptions not material here), and is, therefore, null and void.

11. Plaintiff is advised, believes and therefore avers that the aforesaid defendants (board of school directors) have authorized the transportation of students who attend a sectarian school which is not located in the Rose Tree Union School District. Neither the aforesaid act nor any other provision of the "Public School Code of 1949" authorizes the transportation of pupils who attend a school outside of the school district and said action, therefore, is null and void.

12. The aforesaid Act 91 is null and void in that it does not provide for the welfare and safety of children but rather provides for support and assistance to nonpublic and sectarian religious education in violation of the Constitution of the Commonwealth of Pennsylvania and the United States.

13. Plaintiff has no adequate remedy at law and unless the relief hereinafter requested is granted, she, as a taxpayer will suffer irreparable injury.

WHEREFORE, plaintiff prays that the Court enter a decree enjoining the defendants temporarily until hearing and perpetually thereafter from expending any further or additional sums for the purpose of implementing the aforesaid act and from causing, permitting or authorizing the use of any buses for the free transportation of sectarian school students to or from sectarian schools.

WILLIAM P. THORN,
Attorney for Plaintiff.

COMMONWEALTH OF PENNSYLVANIA

ss.:

COUNTY OF MONTGOMERY

BETTY J. WORRELL, being duly sworn according to law, deposes and says that she is the Plaintiff in the above action

and that the facts set forth in the foregoing Amended Complaint In Equity are true and correct to the best of her knowledge, information and belief.

BETTY J. WORRELL,
Plaintiff.

Sworn to and subscribed before me this 23rd day of September A. D. 1965.

ELIZABETH M. HOUPT,
Notary Public.

Notary Public, Upper Merion Twp., Mont. Co. My Commission Expires January 29, 1968.

ANSWER TO AMENDED COMPLAINT

The Defendants Answer the Amended Complaint as follows:

1. Admitted.

2. Paragraph 2 of the Complaint is admitted except for the allegation concerning the residence of H. John Lumsden. H. John Lumsden resides at 3308 Chatham Place, Upper Providence Township, Delaware County, Pennsylvania.

3. Admitted.

4. Admitted.

5. Admitted.

6. It is admitted that the said Defendants propose to provide free bus transportation to some pupils who attend sectarion schools. The other averments of paragraph 6 of the Amended Complaint are conclusions of law and require no answer.

7. The averments of paragraph 7 of the Amended Complaint are conclusions of law and require no answer.

8. The averments of paragraph 8 of the Amended Complaint are conclusions of law and require no answer.

9. The averments of paragraph 9 of the Amended Complaint are conclusions of law and require no answer.

10. The averments of paragraph 10 of the Amended Complaint are conclusions of law and require no answer.

11. The first sentence of paragraph 11 of the Amended Complaint is admitted. The other averments of paragraph 11 of the Amended Complaint are conclusions of law and require no answer.

12. The averments of paragraph 12 of the Amended Complaint are conclusions of law and require no answer.

13. The averments of paragraph 13 of the Amended Complaint are conclusions of law and require no answer.

GEORGE W. THOMPSON,
Attorney for Defendants.

COMMONWEALTH OF PENNSYLVANIA

ss.:

COUNTY OF MONTGOMERY

H. JOHN LUMSDEN, being duly sworn according to law, deposes and says that he is one of the Defendants and Secretary of the Board of School Directors of Rose Tree Union

School District and that the facts set forth in the foregoing Answer are true and correct to the best of his knowledge, information and belief.

H. JOHN LUMSDEN

Sworn to and subscribed before me this 8th day of October, A.D. 1965.

SHIRLEY V. MOVERY,
Notary Public.

Upper Darby Twp., Delaware Co., Pa. My Commission Expires August 4, 1969.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

BETTY J. WORRELL
vs.
GEORGE MATTERS, et al

No. 10209 of 1965
IN EQUITY

PETITION TO INTERVENE

The petition of Paul A. Grubb, Linda Grubb, his wife; Donald Manz, Anna Manz, his wife; John Quindlen and Catherine Quindlen, his wife, respectfully represents:

1. Paul A. Grubb and Linda Grubb are husband and wife, residing at 7 Valley Road, Edgmont Township, Delaware County, Pennsylvania, and are residents within the geographical boundaries of the Rose Tree Union School District.

2. The said Paul A. Grubb and Linda Grubb have five children of school age, four children in attendance at St. Francis de Sales parish school in Lenni, Aston Township, Delaware County, and one child at St. James High School in Chester, Delaware County, Pennsylvania.

3. Under the Act of Assembly, Act No. 91 which was adopted into law and approved June 15, 1965, they believe that they are entitled to the use of the bus transportation provided by the Rose Tree Union School District, along the established public school routes, for their children. By the above captioned action the plaintiff therein prays the Court to enjoin the authorization and use of buses for transporting their children to school.

4. The said Paul A. Grubb and Linda Grubb believe that should the prayer of the plaintiff be granted, their rights under the Act of Assembly and the rights of their children would be violated and that their rights under Amendment I to the Constitution of the United States would be violated in that they would be denied their religious liberty and the religious liberty of their children and the free exercise thereof.

5. The said Donald J. Manz and Anna Y. Manz are husband and wife, residing at 28 War Trophy Lane, Middletown Township, Delaware County, Pennsylvania, and are residents within the geographical boundaries of the Rose Tree Union School District.

6. The said Donald J. Manz and Anna Y. Manz have two children in attendance at St. Francis de Sales parish school in Lenni, Aston Township, Delaware County, Pennsylvania.

7. Under the Act of Assembly, Act No. 91 which was adopted into law and approved June 15, 1965, they believe

that they are entitled to use the bus transportation provided by the Rose Tree Union School District, along the established public school routes, for their children. By the above captioned action the plaintiff therein prays the Court to enjoin the authorization and use of buses for transporting their children to school.

8. The said Donald J. Manz and Anna Y. Manz believe that should the prayer of the plaintiff be granted, that their rights under the Act of Assembly and the rights of their children would be violated and that their rights under Amendment I to the Constitution of th United States would be violated in that they would be denied their religious liberty and the religious liberty of their children and the free exercise thereof.

9. The said John Quindlen, Jr. and Catherine Quindlen are husband and wife, residing at 1129 Roberts Road, Upper Providence Township, Delaware County, Pennsylvania, an dare residents within the geographical boundaries of the Rose Tree Union School District.

10. The said John Quindlen and Catherine Quindlen have two children in attendance at Nativity of the Blessed Virgin Mary parish school in Media, Delaware County, Pennsylvania.

11. Under the Act of Assembly, Act No. 91 which was adopted into law and approved June 15, 1965, they believe that they are entitled to use the bus transportation provided by the Rose Tree Union School District, along the established public school routes, for their children. By the above captioned action the plaintiff therein prays the Court to enjoin the authorization and use of buses for transporting their children to school.

12. The said John Quindlen and Catherine Quindlen believe that should the prayer of the plaintiff be granted, that their rights under the Act of Assembly and the rights of their children would be violated and that their rights under Amendment I to the Constitution of the United States would be violated in that they would be denied their religious liberty and the religious liberty of their children and the free exercise thereof.

WHEREFORE, all the aforesaid petitioners request leave to Intervene and defend against any Injunction denying them their rights and the rights of their children, and they further request leave to file a responsive pleading to the Complaint within twenty days should the Court permit their intervention.

REED AND GIBBONS,
Attorneys for Petitioners.

COMMONWEALTH OF PENNSYLVANIA

ss.:

COUNTY OF DELAWARE

PAUL GRUBB and LINDA GRUBB, his wife, being duly sworn according to law, depose and say that they are petitioners in the foregoing petition, and the facts set forth relating to their interest, are true and correct to the best of their knowledge and belief.

PAUL GRUBB
LINDA GRUBB

Sworn to and subscribed before me this 2nd day of September, 1965.

GENEVIEVE H. MCCARTHY,
Notary Public.

Notary Public, Media, Delaware Co., Pa. My Commission Expires October 14, 1968.

COMMONWEALTH OF PENNSYLVANIA

ss.:

COUNTY OF DELAWARE

DONALD MANZ and ANNA MANZ, his wife, being duly sworn according to law, depose and say that they are petitioners in the foregoing petition, and the facts set forth relating to their interest, are true and correct to the best of their knowledge and belief.

DONALD MANZ
ANNA MANZ

Sworn to and subscribed before me this 2nd day of September, 1965.

GENEVIEVE H. McCARTHY,
Notary Public.

Notary Public, Media, Delaware Co., Pa. My Commission Expires October 14, 1968.

COMMONWEALTH OF PENNSYLVANIA

ss.:

COUNTY OF DELAWARE

JOHN QUINDLEN, JR. and CATHERINE QUINDLEN, his wife, being duly sworn according to law, depose and say that they are petitioners in the foregoing petition, and the facts set forth relating to their interest, are true and correct to the best of their knowledge and belief.

JOHN QUINDLEN, JR.
CATHERINE QUINDLEN

Sworn to and subscribed before me this 2nd day of September, 1965.

GENEVIEVE H. McCARTHY,
Notary Public.

Notary Public, Media, Delaware Co., Pa. My Commission Expires October 14, 1968.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

BETTY J. WORRELL
vs.
GEORGE MATTERS, et al

No. 10209 of 1965
IN EQUITY

RULE TO SHOW CAUSE

AND Now, this 3rd day of September, 1965, upon consideration of the within petition, a Rule to Show Cause why the petitioners should not be granted leave to Intervene as parties-defendant in the above matter, is granted.

This Rule is Returnable September 7, 1965 at 10 o'clock A.M. in Court Room No. 1, Court House, Media, Pennsylvania.

By THE COURT:
JOHN V. DIGGINS,
J.

PETITION FOR ISSUANCE OF A WRIT OF SPECIAL CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SAID COURT:

The Commonwealth of Pennsylvania by Walter E. Alessandroni, Attorney General, Intervenor, respectfully petitions your Honorable Court to issue a Writ of Special Certiorari to the Court of Common Pleas of Delaware County in the matter of *Betty J. Worrell v. George W. Matters, et al.*, No. 10209 of 1965, in equity, to remove the proceedings to the Supreme Court and there to set the matter down for disposition and in support whereof respectfully represent:

1. The Act of June 15, 1965 (Act No. 91) directs the school districts of the Commonwealth which provide free transportation for resident pupils to and from public schools to also furnish under certain limiting terms and conditions similar transportation for children attending nonpublic, nonprofit schools.

2. Plaintiff on September 1, 1965 filed this action in equity for an injunction to restrain officers of the Rose Tree Union School District from complying with the mandate of the Act. Declaration of Intervention in said case has been filed by Walter E. Alessandroni, Attorney General, on behalf of the Commonwealt hof Pennsylvania. Plaintiff's complaint and Intervenor's answer are attached hereto and marked as Exhibits A and B respectively.

3. On August 30, 1965 taxpayers instituted suit in the Court of Common Pleas of Montgomery County against officials of the School District of Abington Township to enjoin them from complying with the terms of Act No. 91. *Brenard*

G. Rhoades, et al. v. School District of Abington Township, Docket No. 65-10471, Commonwealth Docket, 1965. Declaration of Intervention in said case has been filed by Walter E. Alessandroni, Attorney General, on behalf of the Commonwealth of Pennsylvania. A petition for the issuance of a Writ of Special Certiorari to the Court of Common Pleas of Montgomery County in the said case has been filed in the Supreme Court of Pennsylvania contemporaneously with the instant petition.

4. Your Petitioners are informed, believe, and therefore aver that other, similar proceedings will be brought in other counties of the Commonwealth.

5. Each of these actions presents a single, identical issue of law. None of them involves the resolution of a disputed material issue of fact.

6. Each complaint challenges the constitutionality of Act No. 91 under provisions of the Pennsylvania Constitution which prohibit aid to sectarian institutions and provisions of the Federal Constitution respecting an establishment of religion.

7. The issue thus raised is one of paramount public importance and, yet, of the most delicate character. It can be resolved only by this Court speaking authoritatively and definitively on the meaning of these constitutional provisions as applied to the State action here brought into question.

8. For the several Courts of Common Pleas to assume and retain jurisdiction over numerous proceedings, each one identical with the other, would place an undue and unnecessary burden upon the courts of this Commonwealth and cause confusion in the administration of justice.

9. The legality of the actions of school district officials who are currently providing transportation for school chil-

dren pursuant to the provisions of Act No. 91 have been called into question.

10. The challenges to the Act jeopardize the health and safety of over 70,000 child beneficiaries under the Act in their travel to and from school.

11. This Court in the exercise of its King's Bench powers has supervisory jurisdiction over all inferior tribunals and may remove the record therefrom at any stage of the proceeding when, for any reason, the ends of justice would be promoted thereby. *Bell Appeal*, 396 Pa. 592 (1959), *School District of Township of Upper Merion v. Boehm, et al.*, 418 Pa. 520 (1965), Butcher v. Bloom, 415 Pa. 438 (1964).

12. By reason of the great public interest in this case, the importance of its ultimate determination to the citizens, taxpayers and parents of the Commonwealth, and in order to avoid a multiplicity of similar suits and to remove the threat posed by this suit to present any prospective programs of school districts for transportation of nonpublic school pupils, and in view of the broad powers possessed by your Honorable Court, your Petitioners believe and therefore aver that the interests of the citizens of the Commonwealth of Pennsylvania and of justice would be best served were your Honorable Court to take jurisdiction of this case.

WHEREFORE, the Commonwealth of Pennsylvania by Walter E. Alessandroni, Attorney General, Intervenor, respectfully requests your Honorable Court to issue a Special Writ of Certiorari to the Court of Common Pleas of Delaware County commanding that the record in the within proceeding and all matters touching the same be certified and transmitted forthwith to your Honorable Court and that the cause be set down and consolidated with the case of

Rhoades, et al. v. School District of Abington Township, supra, for argument.

Respectfully submitted,

s/WALTER E. ALESSANDRONI
WALTER E. ALESSANDRONI
Attorney General

s/EDWARD FRIEDMAN
EDWARD FRIEDMAN
Deputy Attorney General

s/JOHN P. McCORD
JOHN P. McCORD
Deputy Attorney General

Department of Justice
Harrisburg, Pa. 17120
September 21, 1965

COMMONWEALTH OF PENNSYLVANIA

ss.:

COUNTY OF DAUPHIN

EDWARD FRIEDMAN, being duly sworn according to law, deposes and says that he is a Deputy Attorney General of the Commonwealth of Pennsylvania and that as such he is authorized to and does take this affidavit to the above captioned Petition for Writ of Special Certiorari and that the facts set forth therein are true and correct to the best of his information, knowledge and belief.

s/EDWARD FRIEDMAN
EDWARD FRIEDMAN

Sworn to and subscribed before me this 24th day of September, 1965.

s/GABRIEL SALERNO,
Notary Public.

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SUPREME COURT, U.S.
FILED
MAY 23 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1918~~ 118

BETTY J. WORRELL,
Petitioner

v.

GEORGE W. MATTERS ET AL.,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, RESPONDENTS, IN OPPOSITION

EDWARD FRIEDMAN,
Counsel General,
JOHN P. MCCORD,
Deputy Attorney General,
WILLIAM C. SENNETT,
Attorney General,
Attorneys for Commonwealth of Pennsylvania, Intervenor; Department of Justice.

State Capitol,
Harrisburg, Pennsylvania 17120.

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1966
No. 1318

Betty J. Worrell,

Petitioner

v.

George W. Matters et al.,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, RESPONDENT, IN OPPOSITION

OPINIONS BELOW

The opinions of the Pennsylvania Supreme Court are reported at 424 Pa. 202 and 226 A. 2d 53.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF QUESTION PRESENTED

1. Was the Supreme Court of Pennsylvania correct in holding that the statute (requiring public school districts which provide school bus transportation to public school children to make such transportation available to nonpublic school children along established public school bus routes) does not violate the disestablishment clause of the First Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment to the said Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution of the United States and the Pennsylvania statutes involved are set forth in the Petition at pp. 3, 4.

STATEMENT OF THE CASE

The Commonwealth, respondent, agrees with the statement made by the petitioner in her Petition for a Writ of Certiorari.

ARGUMENT

1. The Federal Question Has Been Adjudicated

The constitutional issue asserted by petitioner has been conclusively adjudicated and determined by this Honorable Court in *Everson v. Board of Education*, 330 U.S. 1 (1947). That decision squarely held that a statute such as that here challenged did not violate the disestablishment clause of the First Amendment.

Petitioner seeks a review and reversal of the *Everson* decision because as she claims "this area of the law is clouded with doubt and confusion."[1] A referral to the cases decided by your Honorable Court wherein reference is made to the doctrine of *Everson* clearly demonstrates the error of this statement. In every such case your Honorable Court reaffirmed and reemphasized the legal principle therein enunciated clearly and without equivocation.

[1] The implications of the disestablishment clause have been intensively explored in the following decisions which are universally regarded and accepted as clear and free from doubt: *Everson v. Board of Education*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Petitioner seeks to dilute the effect and authority of the *Everson* decision, supra, on the ground that it was rendered twenty years ago and by a vote of five to four. But if the fact of the passage of twenty years since its issuance may be said to qualify the authority of a decision by this Court, then the authority of every decision which it handed down prior to 1947 would be in jeopardy. It is scarcely necessary, moreover, to argue here that a decision by a divided court nevertheless carries the full weight of that court's authority.

Petitioner states that this Court, since handing down its decision in the *Everson* case, has considered a number of other cases "which have cast some question upon its validity." But petitioner fails to cite a single such case. In actual fact this Court, in its decisions subsequent to the *Everson* case, has in no way given indication that its ruling therein is now to be regarded as qualified or subject to doubt; rather, it has provided specific recognition of that holding.

In *McGowan v. Maryland,* 366 U.S. 420 (1961), the appellants who had been convicted of violation of the Maryland Sunday closing laws, contended that such laws violated the disestablishment clause. This Honorable Court, per Warren, C. J., speaking for six Justices (Warren, Black, Clark, Brennan, Whittaker and Steward) relied upon *Everson* in answer as follows:

> "Under challenge was a statute authorizing repayment to parents of their children's transportation expenses to public and Catholic schools. The Court, speaking through Mr. Justice Black, recognized that 'it is undoubtedly true that children are helped to get to church schools', and '[t]here is even a possibility

that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State' Id. 330 U.S. at 17. But the Court found that the purpose and effect of the statute in question was general 'public welfare legislation,' id. 330 U.S. at 16; that it was to protect all school children from the 'very real hazards of traffic,' id. 330 U.S. at 17; that the expenditure of public funds for school transportation, to religious schools or to any others was like the expenditure of public funds to provide policemen to safeguard these same children or to provide 'such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks,' id. 330 U.S. at 17, 18."

Id. at 443.

In a separate concurring opinion in which he was joined by Mr. Justice Harlan, Justice Frankfurter likewise acknowledged the authority of the doctrine of the *Everson* case, stating that:

". . . once it is determined that a challenged statute is supportable as implementing other substantial interests than the promoting of religious belief, the guarantee prohibiting religious 'establishment' is satisfied."

Id. at 466.

He then noted that unless the end achieved by a statute were promotion of religious doctrine or support of a

church, the statute was not violative of the disestablishment clause even though it might cause some children to go to nonpublic schools:

> "However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, Pierce v. Society of Sisters, 268 U.S. 510, 60 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468, that this Court held in the Everson case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment', even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone."
>
> *Id.* at 467.

Justice Frankfurter, who had dissented in *Everson*, thus expressed his full recognition of its validity and acceptance of its authority.

In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), involving Bible-reading in the public schools, this Court summed up its prior decisions on the religion clauses of the First Amendment as bespeaking a policy of "wholesome neutrality". Mr. Justice Clark, speaking on behalf of eight members of the Court pointed out that there are situations in which a tension between demands of free exercise and disestablishment may exist.

As the Court put it, "the two clauses may overlap". In 1947, in the *Everson* case, the Court had dealt with a significant example of such overlap in the question of public busing of parochial school children. As recently as 1963 the Court explicitly reinforced the doctrine it had stated in 1947:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education, 300 U.S. 1 . . ."
>
> *Abington Township School District v. Schempp*, 374 U.S. 203, 222.[2]

In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court again reiterated the doctrine of the *Everson* case. It held that South Carolina might not constitutionally apply the eligibility provisions of her unemployment compensation statute so as to compel a Seventh Day Adventist worker "to abandon his religious convictions respecting the day of rest" (by denying him state benefits though he refused to be employed on Saturdays). The Court based its decision squarely upon *Everson:*

---

[2] Separate additional affirmation of the authority of the *Everson* holding was provided by Stewart, J.: "On the other hand, the Court has upheld against such challenge * * * a law authorizing reimbursement from public funds for the transportation of parochial school pupils. *Everson v. Board of Education*, 330 U.S. 1 * * *" 374 U.S. 203, 311.

> "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no state may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. Everson v. Board of Education, 330 U.S. 1 . . ."
>
> 374 U.S. 398, 410.

It is evident from a reading of the remaining comment of petitioner upon the *Everson* decision, that, far from finding the area of law which it covers "clouded with doubt and confusion", petitioner finds that decision all too clear and thus urges this Court to overrule itself.

It is significant that the two justices of the Supreme Court of Pennsylvania who dissented in the instant case based their dissent upon the Pennsylvania Constitution and expressly recognized the validity of the statute in question under the Constitution of the United States, as interpreted by this Honorable Court in *Everson.* As Bell, C. J., one of the dissenters, stated:

> "So far as the 'Establishment Clause' is concerned, I believe the present cases are ruled by the leading case of Everson v. Board of Education, 330 U.S., supra, where the facts and issues are strikingly similar."
>
> *Rhoades et al. v. School District of Abington Township,* 424 Pa. 202, 240 (1967).

This Court has recently reviewed the single constitutional issue herein involved and ruled adversely to petitioner's contentions. In 1961 a decision by the Connecticut

Supreme Court of Errors, upholding the constitutionality of a Connecticut statute providing transportation at public expense for nonpublic school children,[3] was appealed to this Honorable Court which dismissed the appeal for want of a substantial federal question.[4]

---

2. Petitioner Raises No New Question

Petitioner raises no issues which were not fully considered by this Court and ruled upon in its decision in the *Everson* case. A considerable portion of her argument is devoted to purely *legislative* questions—matters resolved by the General Assembly of the Commonwealth of Pennsylvania in the proper exercise of its discretion and which the Supreme Court of that state properly abstained from considering. For example, petitioner argues that the statute in question does not in fact promote the safety of children (See Petition, pp. 11-15). It is submitted that petitioner's speculations as to practical effectiveness of the legislation, its wisdom or lack of it, or with respect to other purely legislative issues, present no substantial question for this Court to decide.

---

[3] Snyder v. Newton, 147 Conn. 374 (1961).
[4] 365 U.S. 299 (1961).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
EDWARD FRIEDMAN,
Counsel General,
JOHN P. MCCORD,
Deputy Attorney General,
WILLIAM C. SENNETT,
Attorney General,
Attorneys for Commonwealth of Pennsylvania, Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1967

No. ~~3018~~ 110

BETTY J. WORRELL,
Petitioner

v.

GEORGE W. MATTERS ET AL,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF OF PAUL A. GRUBB, LINDA GRUBB, DONALD MANZ, ANNA MANZ, JOHN QUINDLEN, and CATHERINE QUINDLEN, RESPONDENTS, IN OPPOSITION

D. BARRY GIBBONS
14 West Second St., Media, Pa.

WILLIAM B. BALL
212 State St., Harrisburg, Pa.

Attorneys for Paul A. Grubb et al., Intervenors.

THE CHANCELLOR PRESS - Law Printers, Publishers - Norristown, Pa.

Case Caption

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1966
No. 1318

Betty J. Worrell,

Petitioner

v.

George W. Matters et al.,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF OF PAUL A. GRUBB, et al., RESPONDENTS, IN OPPOSITION

OPINIONS BELOW

The opinions of the Pennsylvania Supreme Court are reported at 424 Pa. 202 and 226 A. 2d 53.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF QUESTION PRESENTED

1. Was the Supreme Court of Pennsylvania correct in holding that the statute (requiring public school districts which provide school bus transportation available to nonpublic school children along established public school bus routes) does not violate the disestablishment clause of the First Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment to the said Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution of the United States and the Pennsylvania statutes involved are set forth in the Petition at pp. 3, 4.

STATEMENT OF THE CASE

The Commonwealth, respondent, agrees with the statement made by the petitioner in her Petition for a Writ of Certiorari.

ARGUMENT

Respondents Paul A. Grubb, et al., join in the Brief of the Commonwealth of Pennsylvania, Respondent, in Opposition, filed heretofore in this proceeding.

CONCLUSION

For the reasons stated it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

D. BARRY GIBBONS,

WILLIAM B. BALL,

Attorneys for Intervenors

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COUNTER-STATEMENT OF THE CASE.

In 1965, The General Assembly of the Commonwealth of Pennsylvania amended the Public School Code of 1949, Section 1361, to provide for free transportation of elementary and high school students who regularly attend non-public, non-profit schools. The amendment further provides that the transportation shall be over established public school bus routes and the pupils shall be transported to and from points on such routes nearest and most convenient to the schools they attend.

Petitioner brought suit in Delaware County, Pennsylvania, seeking to enjoin the expenditure of public funds by a School District for that purpose. A like action was commenced immediately thereafter in Montgomery County, Pennsylvania. These suits were consolidated and the Supreme Court of Pennsylvania took original jurisdiction. Later a similar action was filed in Philadelphia against the Philadelphia School District and both parties intervened in the Supreme Court of Pennsylvania. This brief is in behalf of the Philadelphia School District as respondent.

ARGUMENT.

I. The Challenged Legislation Is a Valid Exercise of the State's Police Power.

The real issue in this case can be simply stated: Is the expenditure of public monies pursuant to the amended Act of the Pennsylvania Legislature, an unconstitutional establishment of religion, or is it a valid exercise of the state's police powers to care for the health, welfare and safety of its citizens, particularly the young?

It is to be noted that the Act makes transportation available to *any* pupil of a non-public, non-profit school and is not limited to transportation to and from schools conducted by religious groups.

It is significant that Pennsylvania's system of school bus transportation operates only in the absence of other adequate public transportation. Thus, striking down the 1965 Amendment to the Act would relegate these pupils to private cars or lengthy walks either in rural loneliness or in metropolitan traffic.

The superiority of a school bus as a safe method of transportation is beyond debate. Throughout the nation, motor vehicle codes provide special rules of the road for the protection of such vehicles.

The grim statistics of traffic fatalities and casualties dramatically illustrate the safety of school bus transportation.[1] And, in *Everson v. Board of Education*, 330 U. S. 1, 91 L. Ed. 711 (1946), the Court emphasized this fact.

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1. Then Secretary of Public Welfare, Arlin Adams, in testifying on this amendment, stated that "with respect to injuries, a person is five times as safe in a school bus as in a car. With respect to death, a person is ten times as safe in a school bus as in a car." In support of this statement, he cited statistics: "In 1963, there were 2.3 deaths per 100,000 miles, in cars, as compared to .2 deaths per 100,000 miles in school buses." (R. p. 4a)

Petitioner glossing over this most important factor, despite its prominence in the record, argues as though safety was totally absent and that the legislature's motive was simply to aid parochial schools.

Moreover, if Petitioner were correct *all* transportation of pupils attending sectarian schools at the taxpayer's expense would be forbidden. But, as is well known, Congress, legislatures, and governing bodies at lower levels regularly appropriate large sums of money for mass transportation. This is particularly true in Philadelphia where our commuter system is kept alive with Federal, State and County funds. Such appropriations make possible fares at less than cost. If Petitioner prevailed, no child whose origin or destination is a sectarian school would be permitted to use subsidized mass transportation. Moreover, if Petitioner were correct subsidized commuter trains would have to exclude commuters destined for churches or other places of religious worship or returning to their homes after worship.

But, Petitioner is not correct. Transportation to students attending sectarian schools is not absolutely prohibited. Indeed, there is no better reason for the use of such transportation than the child's health, safety and welfare. *Everson, supra.*

The reasons which impelled the Court to decide *Everson* are even more cogent today. In 1946, the Court deemed it dangerous to commit any chool child to the highways. That danger has multiplied many times.

Traffic has increased at an alarming rate and with it highway fatalities and casualties. Highways and streets passable 25 years ago can no longer be crossed without risk to life and limb despite traffic lights and electronic devices. Traffic circles, then thought a safety measure, have now become accident traps. In spite of speed limits imposed by law the toll of highway accidents mounts.

But, traffic is not the only sinister threat in the child's path to and from school. We cannot ignore the danger of

child molestation and even rape. We do not suggest that travel in a school bus removes the child from every danger. However, it does reduce substantially the child's exposure to danger. In any event, so the Pennsylvania Legislature thought. Rightly or wrongly, this is a matter wisely left exclusively to the discretion of that body.

As already alluded to, the law here under attack establishes no transportation for students of sectarian schools as such. It merely makes existing public bus routes available on a general basis. To deny a child these safety benefits because of attendance at a sectarian school, might well in itself violate the Constitution as a prohibition of the free exercise of religion protected by the First Amendment (made applicable to the states by the Fourteenth Amendment).

Even if allowing these children to share the existing bus routes at no expense to the sectarian schools incidentally aids such schools, it cannot amount to the establishment of a religion. It represents only a minute part of any school or church budget.

It is clear that we are dealing here with public welfare legislation. As this Court declared in *Everson* (330 U. S. 1, 7):

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. . . . The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitch hiking'."

and on p. 18:

> "[The] legislation, as applied, does no more than provide a general program to help parents get their chil-

dren, regardless of religion, safely and expeditiously to and from accredited schools."

In *Pierce v. The Society of Sisters,* 268 U. S. 510 (1925), the Court held that an act compelling school attendance in public schools only is an unconstitutional interference with the liberty of parents and guardians to direct the upbringing and education of children under their control. In commenting on *Pierce,* the Court in *Everson* stated on p. 18:

> "Parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular education requirements which the state has the power to impose."

It follows, therefore, that to deny to a child the benefits of this public welfare legislation merely because it goes to one qualified school rather than another is in itself a denial of equal protection under the Fourteenth Amendment.

II. Petitioner's Contention That the Challenged Act Is So Vague and Indefinite as to Violate the Fourteenth Amendment Does Not Stand Up Under Analysis.

Petitioner seems to think that the phraseology, "non-public elementary and high schools not operated for profit" is incapable of comprehension. We suggest that its meaning is too clear to be labored. Also, surprisingly Petitioner objects to the phraseology "over established public school bus routes". The fact is that every school district which provides bus transportation for its pupils does so over well recognized or established routes.

For a long time before passage of the 1965 Amendment, school children have been gathering on well known school bus stops, awaiting their bus transportation. These have become established public school bus routes and the chil-

dren involved obviously have no difficulty finding where these public school bus routes have been established.

Petitioner also objects to the provision of the Amendment that the pupils are to be transported to and from points on the established public school bus routes "nearest or most convenient to the schools which such pupils attend".

Here again the meaning is clear. All this means is that the points of boarding and destination must be as convenient as possible along the established public school bus routes. In any event, all of these are matters which are and must be vested within the administrative discretion of the School Board. Certainly there would be no reason to strike down an important piece of public welfare legislation on so flimsy a ground.

As Mr. Justice Musmanno, speaking for the majority of the Supreme Court of Pennsylvania so cogently stated: (Record, p. 26a)

> "Finally, the plaintiffs argue that Act 91 is unconstitutional because of 'vagueness'. The only thing vague in this entire situation is the charge of vagueness advanced by the plaintiffs. It is like a splash of rain that has no target and leaves no durable impression. A reading of Act 91 will reveal its stark simplicity, specificity and secularization. It has but one aim and that is to place nonpublic schools, in the matter of student transportation, in the same classification as public schools, so long as the nonpublic schools observe the public school curricula. There is nothing in either the Federal or State constitution, the laws of the Commonwealth, or in fundamental justice to prohibit so salutary an objective."

III. Everson Is Dispositive of the Case Sub Judice.

There is presented here no reason why the Court should re-examine *Everson* other than the fact that it was decided by a five to four vote. *Everson's* well established guideline

to the states has worked out well in the 20 years of its existence. Petitioner points to no fact which has occurred over these two decades which demands an overruling of *Everson.* Nor has Petitioner pointed to a fact which even suggests that any religion or religious sect has in any significant way been established as a result of application of *Everson.* The fact is that twenty years of experience in the practical application of *Everson* has not resulted in the establishment of any religion. *Everson's* vitality is unimpaired. At this late date its ruling ought not to be disturbed.

Accordingly, for the foregoing reasons, respondent respectfully requests the Court to deny certiorari.

Respectfully submitted,

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